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Supreme Court of the United States

OCTOBER TERM, 1948

No. 272

ARTHUR TERMINIELLO, PETITIONER,

vs.

CITY OF CHICAGO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1948.

CERTIORARI GRANTED DECEMBER 13, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1947

No. 30365

ARTHUR TERMINIELLO, Petitioner,

vs.

CITY OF CHICAGO, Respondent

Petition for Leave to Appeal from Appellate Court of Illinois, First District, First Division

There Heard on Appeal from Municipal Court of Chicago

Honorable John V. McCormick, Judge Presiding

Petition for Leave to Appeal—Filed August 14, 1947

[fol. 24] [Title omitted]

OPINION OF THE APPELLATE COURT

Mr. Justice Feinberg Delivered the Opinion of the Court:

The defendant was arrested upon a sworn complaint, filed in the Municipal Court of Chicago, charging in the language of the ordinance of Chicago that on the 7th day of February, 1946, he did make, or aid in making, an improper noise, riot, disturbance, breach of the peace or diversion tending to a [fol. 2-2] breach of the peace, within the limits of the City, in violation of chapter 193, section 1 (1) of the Revised Code of 1939, as amended. Upon a trial with a jury, a verdict was returned finding him guilty and assessing a fine against him of $100. After motions for a new trial, for judgment notwithstanding the verdict and in arrest of judgment were overruled, the court entered judgment upon the verdict, and defendant appeals.

A direct appeal was taken by the defendant to the Supreme Court. *City of Chicago v. Terminiello*, 396 Ill. 41. The Supreme Court, holding that no constitutional question was involved, and there being no certificate by the trial judge that the validity of an ordinance was involved, transferred the cause to this court for determination.

The charge grows out of a speech delivered by the defendant and his conduct at a meeting held on February 7, 1946, in the auditorium of a building operated by the West End Woman's Club, located at the northeast corner of Monroe Street and Ashland Avenue in Chicago. It was rented by those in charge of the meeting. One of the witnesses for defendant, who was stationed at the entrance to the auditorium to collect the tickets of admission, estimated the number of people in the auditorium to be from 800 to 1000. It appears from the record that a printed invitation was distributed to announce this meeting, signed by one Gerald L. K. Smith and mailed to people from a mailing list. Accompanying this invitation were cards of admission to be presented at the place of meeting. The invitation is as follows:

[fol. 2-3] "The Father Coughlin of the South, Father Terminiello, Will Speak Here

DEAR PATRIOTIC FRIEND:

Father Arthur W. Terminiello, the radio Priest of the South, has agreed to speak in Chicago on the 7th of February. This young Priest, age 39, is responsible more than any other single individual in America for bringing about the investigation of the Pearl Harbor scandal.

Father Terminiello has been referred to by many as the Father Coughlin of the South. The same people who hate Father Coughlin hate Father Terminiello. They have persecuted him, hounded him, threatened him, but he has remained unaffected by their anti-Christian campaign against him. You will hear all sorts of reports concerning Father Terminiello. But remember that he is a Priest in good standing and a fearless lover of Christ and America. His dynamic and historic radio address entitled 'The Cross of War' has had a circulation running up into millions.

Father Terminiello is a true Christian Nationalist. He is editor of The Crusader. He is the director of a rapidly growing movement known as The Union of Christian Crusaders.

I wish it were possible for me to preside over a meeting where I could introduce Father Charles E. Coughlin. Unable to do this as yet, I consider that Father Terminello is the best, if not the only substitute that can be found in the United States.

I enclose herewith a few extra cards. These cards will go like hot cakes! Everyone you see will want them. Therefore, make wise distribution of them.

[fol. 2-4] A special committee has rented the auditorium of the West End Woman's Club. Although it has ample facilities we expect it to be well filled to hear the courageous message of this young Priest. Doubtless what he has to say will be one of the boldest and bravest public statements to which you have ever listened. The slogan should be: Christ or Chaos—Christian Nationalism or World Communism—Which?

Sincerely yours, Gerald L. K. Smith."

The card of admission, enclosed with the invitation, reads as follows:

"This card will admit bearer and one friend to hear Father Arthur W. Terminiello (The Father Coughlin of the South) West End Woman's Club.
37 S. Ashland Blvd. (cor. Monroe) Chicago, Illinois
Thursday, February 7, 1946 * * * 8 p. m.
Subject: Christians, Awake!

Dealing with the most dangerous and dynamic issues of the hour. The most fearless speech since the war.

Father Terminiello will be introduced by Gerald L. K. Smith. Auspices: Christian Veterans of America, Frederick Kister, Director.

Admission by Card Only."

The principal contentions of the defendant, upon which he seeks a reversal, are: (1) that, in order for him to be found guilty of the charge in the complaint, the speech of the defendant would necessarily have to be a public utterance at a public meeting, and that this meeting in question was a private one; (2) that the speech delivered

by him was one he had a right to deliver and was protected by the First and Fourteenth Amendment to the Constitution [fol. 2-5] of the United States, and by the Constitution of Illinois; that what he said at the meeting, and the manner in which he delivered it, was not a breach of the peace or diversion tending to a breach of the peace and, therefore, did not violate the ordinance.

As to the first contention, whether the meeting was a public meeting, we find in the record the following facts: that the hall was filled to capacity, with about 200 to 300 persons having tickets of admission unable to get in, some having obtained admission who were not desired by those in charge of the meeting; that Ira Latimer testified that he was executive secretary of the Chicago Civil Liberties Committee, with which he was connected for 10 years and prior to which he taught social science at Columbia Teachers College in Chicago and LeMoyne College in Memphis; that he received through the mail at his home the invitation together with 7 or 8 tickets of admission, each ticket permitting admission of two persons; that the invitation was addressed to an old address at which he had not lived for a year prior to receiving it. He attended as an observer for the Chicago Civil Liberties Committee.

Karel, a witness for the plaintiff, testified that he has been in the printing business for 15 years, and prior to that was a druggist; that he entered by ticket, which was taken up at the door.

Lucille McVicker Lipman, a witness for plaintiff, testified that a friend had 2 tickets and took her to this meeting; that these tickets were taken up at the door by Mrs. Kister.

[fol. 2-6] Marybelle McManaman, a witness for defendant, testified that she received the invitation to the meeting with 4 or 5 tickets enclosed.

Mrs. Kister, a witness for defendant, testified that she took up all of the tickets and admitted everyone at the door; that invitations were sent out, and "the tickets were just sent to people that we knew, supposedly"; that they tried to refuse admittance to certain persons, even though they had tickets of admission; that she did not have charge of mailing the tickets, nor did she check the mailing list; that she did not know how many tickets were mailed out.

Donald J. McDaniel, a witness for defendant, testified that he assisted at the door in taking up the tickets, and he estimated there were between 800 and 1000 people in the hall; that he was told the capacity of the hall was 700 or 800; that it was filled well to capacity, and they would not let any more in; that there were some standing in the rear; that the doors were closed by the police; that 200 to 300 persons who had tickets were turned away because the place was filled; that he was at his station practically all of the time of the meeting. On cross-examination he testified: "I cannot say that I turned away anyone."

Clara Schneider, a witness for defendant, testified that she and her husband were on the mailing list.

The cases cited by plaintiff are not helpful as to whether this meeting was a public one. All of them, in one form or another, involved the question as to what is a public place, such as *Finnem* v. *The State*, 113 Ala. 106, or what is public property, or the construction of the word "public," such [fol. 2-7] as *State* v. *Baker*, 102 N. E. (Ohio) 732. As was said in *People* v. *Johnson*, 86 Mich. 175, 177:

> "In general terms the offense is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. *Each case where the offense is charged must depend upon the time, place, and circumstances of the act.*" (Italics ours.)

City of *Bloomington* v. *Richardson*, 38 Ill. App. 60, though not in point because the ordinance was directed at control of public gatherings or meetings of any kind on the public streets or alleys of the City of Bloomington, in defining "public meeting" within the meaning of the ordinance, uses this language:

> "This implies, and truly enough, that a private meeting may be held on a public place and a public meeting on a private place."

We have examined the cases cited by the defendant, and we have no quarrel with the principles laid down by these cases that the declaration must be a public one, but none of them involve the question whether, under all the circumstances, the type of meeting in the instant case was a public or private one.

None of them undertake to declare when a meeting, though held in a private hall or auditorium, becomes a public one. The Standard Dictionary defines "public" as "something done or made in public or without concealment; hence, such as to be seen, known or noted by all or by many . . . as a public statement or act."

[fol. 2-8] We are of the opinion that the showing made as to the size and composition of the meeting, the circumstances surrounding those who were admitted and those holding tickets who were unable to get in, the form of invitation, and the rather liberal and indiscriminate way in which the tickets were distributed, give this meeting the necessary characteristics of a public one. The defendant and those in charge of the meeting was in a position by evidence in their control to rebut the *prima facie* proof that this was a public meeting, by showing how the mailing list was made up, how many invitations and tickets were distributed, to establish that the meeting was at least intended to be a private one, limited to membership in some private organization or to a limited group or set, discriminately selected, and not, as in the instant case, a widespread distribution of tickets that entitled each holder to bring a friend. In this connection we should bear in mind the statement contained in the invitation: "I enclose herewith a few extra cards. These cards will go like hot cakes! Everyone you see will want them. Therefore, make wise distribution of them." No such rebuttable evidence was offered by defendant.

We come to the next question, whether his conduct and his speech constituted a breach of the peace or diversion tending to a breach of the peace, and whether it is protected by the Constitutional guarantee of freedom of speech.

In order to clearly understand the conditions as they prevailed at the time he delivered his speech, it becomes necessary to review the evidence of the scene, not only on the outside of the meeting hall but the inside as well, inasmuch as it has a direct and important bearing upon [fol. 2-9] whether the speech was inflammatory, indecent, or profane, and coupled with abusive epithets and tended to incite others to a breach of the peace.

From the testimony of all of the witnesses for defendant, we find proof of the following facts; that around the hour of 6:30 P. M. of the day of the meeting, a crowd gathered in front of the building, and a picket line was

formed by those in apparent protest to the appearance of the defendant and the holding of such a meeting; that the size of the picket line was described variously from 250 to 500 in number, composed of men, women and young people. It was stated by some of the witnesses that the size of the crowd gathered in front of the building was around 1500 in number. This crowd and the picket line, hereinafter detailed, were there before the start of the meeting. About 200 to 300 people who had tickets for admission could not get in because the hall was filled. Some who had tickets and who those in charge of the door tried to keep out, succeeded in getting in. The witness Karel, for the plaintiff, was one of those. He was known to the attendant at the door. A cordon of police was stationed around the outside of the meeting hall before the start of the meeting and 6 or 8 police officers, some in uniform and others not, were stationed within the hall at the front and rear entrances. The picket line carried banners with inscriptions condemnatory of the meeting, and it was so formed as to obstruct and interfere with the free access to the meeting by those entitled to enter. The crowd around the building was a surging, howling mob, hurling epithets at those seeking to get into the meeting. Groups who came together for the meeting were separated by the mob and were unable to remain together or enter the meeting to-
[fol. 2-10] gether. The pushing and milling crowd tried to tear their clothes off. One young woman's coat was torn off of her. Some had to be assisted into the meeting hall by policemen. Before the defendant spoke, those inside the hall could hear the loud noises and the yelling and hollering on the outside. They could hear those on the outside yell "Fascists," "Hitlers" and other names, curse words like "damned Fascists.". Bricks were thrown through the window panes before the speaking started and during the speaking. About 28 windows were broken. The street was black with people on both sides for at least a block either way of the building. Bottles were thrown, "stink" bombs and brickbats were hurled against the building. Missiles of all kinds were flying through the air. A group of 40 boys rushed the police stationed on the staircase and knocked some of them down. About 17 of the group were arrested. Throughout the meeting they kept breaking the windows of the meeting hall. The howling at times drowned out the speaker's voice. The rear door was being bashed in, the

mob trying to crash it in under the speakers' platform. There were a number of attempts to rush the meeting. At one time a brick came through the window, causing the shade to come out, and many people had to jump up. There was a terrific smash, and everybody jumped up. One of the witnesses testified that he heard the crowd hollering, "Hang Smith, kill Smith," and making a chanting noise. Still another witness for the defendant testified that you could not stand the stench-bomb order; that the windows were being smashed throughout the time the defendant spoke.

[fol. 2-11] The defendant testified that Smith invited him to speak to this meeting under the auspices of one of the ladies' clubs; that he arrived at the meeting with Smith and his wife and Mr. Kister, about 15 or 20 minutes past 8 P. M., in a hired car; that the car stopped at the front entrance, and a crowd of 300 or 400 congregated, shouting, cursing and picketing; that they had to form a flying wedge to get through the picket line; and that police escorted them to the building; that the pickets called out to them, "God damned Fascists, Nazis, ought to hang the so and sos"; that when he entered the building he heard the howls of the people outside; that a number of times the door was partly broken through; that when the police looked out and threatened to arrest the wrongdoers, something was thrown at the officers, including ice picks and rocks, that the cursing on the outside could be heard audibly at times. He also testified that there was a general commotion, all kinds of noises and violence, all from the outside. Stones and bricks were thrown in all the time. He testified he did not give a prepared speech; that he just prepared an outline and cut a good deal of it.

There is conflict in the testimony as to all defendant said in his speech and as to all that occurred within the meeting hall. It appears that a shorthand reporter was employed to report the meeting. She produced her shorthand notes at the trial, together with the transcription of her notes. The transcript of defendant's speech by agreement was admitted in evidence. His speech is too lengthy to quote in full, but by many excerpts taken from the transcript we shall point out what defendant said, which clearly support the view we take of his speech and his conduct. He opened his speech with [fol. 2-12] the following statement: "Now, I am going to whisper my greetings to you, Fellow Christians. I will interpret it. I said, 'Fellow Christians,' and I suppose there are some of the *scum* got in by mistake, so I want to tell a

story about the scum. * * * Now, my friends, nothing you hear tonight so far, nothing that I would say can begin to express the contempt I have for that howling mob on the outside. * * * *And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake.* * * * The subject I want to talk to you tonight about is the attempt that is going on right outside this hall tonight, the attempt that is going on to destroy America by revolution. * * * when I began to preach about this menace of America, I was told by our own people, 'It can't happen here. Shut up; it can't happen here. Why talk about those things.' * * * It is happening here, and it only depends upon you, good people, who are here tonight, depends upon all of us together, as Mr. Smith said. The tide is changing; and if you and I turn and run from that tide, we will all be drowned in this tidal wave of Communism which is going over the world. * * * I am not going to talk to you about the menace of Communism, which is already accomplished, in Russia, where from eight to fifteen million people were murdered in cold blood by their own countrymen, and millions more through Eastern Europe at the close of the war are being murdeerd by these murderous Russians, hurt, being raped and sent into slavery. *That is what they want for you, that howling mob outside.* * * * when we degenerate to the so-called Red democracy we are degenerating to the level of the *howling mob on the outside.* * * * 'We are in for a profound revolution. Those of us who realize the inevitableness of the revolution, and are [fol. 2-13] anxious that it be gradual and bloodless instead of somewhat bloody. Of course, *if necessary, we will have it more bloody.*' * * * Now, all of this that is going on, all of this noise that you hear around, is part of a great plan to enrich a few at the expense of the many. * * * Didn't you ever read the Morgenthau plan for the starvation of little babies and pregnant women in Germany? Whatever could a child that is born have to do with Hitler or anyone else at the beginning of the war? Why should every child in Germany today not live to be more than two or three months of age? Because Morgenthau wants it that way, and so did F. D. R. * * * You will know who is behind it when I tell you the story of a doctor in Akron, Ohio. He boasted to a friend of mine within the last few days, while he was in the service of this country as a doctor, he and others of his kind

made it a practice—now, this was not only one man made it a practice to amputate the limbs of every German they came in contact with whenever they could get away with it; so that they could never carry a gun. Imagine men of that calibre, sworn to serve this beautiful country of ours, why should we tolerate them? My friends, this moment someone reminded me of the plan to sterilize them. The nurses, they tell me are going to inject disease in them, syphillis and other diseases in every one that came there all of one race, all non-Christians. * * * Now, let me say, I am going to talk about—I almost said, about the Jews. Of course, I would not want to say that. However, I am going to talk about some Jews. I hope that—I am a Christian minister. We must take a Christian attitude. I don't want you to go from this hall with hatred in your heart for any person, for no person. I say to you; we must have the Christian attitude. * * * we must love every person, Germans and [fol. 2-148] Jews, Italians and everybody. We must not love particularly the criminals among those people. * * * So it is with the Jews, we must condemn the criminals, even if they are Jews. We must condemn Communists wherever we find them, if they are Irish, German, Norwegian or Jews, they must be condemned. But the moment we point to a man and say that man is a Communist, or that his name happens to be Ginsberg, then, we are—considered to be anti Semitic. * * * Now, this danger which we face—let us call them Zionist Jews if you will, let's call them atheistic, communistic Jewish or Zionists Jews, then let us not fear to condemn them. (At this time there was a very loud noise as if something was being thrown into the building.) Don't be disturbed. That happened, by the way, while Mr. Gerald Smith was saying 'Our Father who are in heaven;' (Just then a rock went through the window.) Do you wonder they were persecuted in other countries in the world? And when we were in Cleveland, I hadn't run into this; I was not an old campaigner, like Mr. Smith. I haven't had the courage that he has day after day, and month after month, and year after year, to go out and face that same howling mob; and when I say it for the first time in Cleveland, was where I saw it first, I thank God that I did it, because it brought home to me the realization of the danger you face. * * * How can we expect to save America and say that when I face that audience—that big line in Cleveland. I heard that pagan chant that you hear out there. You know I have always

made a study of the pyschology, sociology of mob reaction. It is exemplified out there. Remember there has to be a leader to that mob. He is not out there. He is probably across the street, looking out the window. * * * There must be some to beat a cadence. Those mobs are chanting: [fol. 2-15] that is the caveman's chant. They were trained to do it. They were trained this afternoon. They are being led; *there will be violence.* That is why I say to you, men, don't you do it. Walk out of here dignified. The police will protect you. * * * We will not be tolerant of that mob out there. We are not going to be tolerant any longer. We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us. We are not going to be tolerant any longer of their pagan eye-for-an-eye philosophy. * * * We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionist Jew, and those are not American Jews. We don't want them in here; we want them to go back where they came from. We are going to stand one and all together and form a solid phalanx of courage and loyalty and strength, and oppose every attempt to breach freedom of speech in America, every attempt to dilute Christianity in America, every attempt to shed American blood to promote Zionism in America, every attempt to demoralize our America, every attempt to persecute our cross * * *." (Italics ours.)

Some of the witnesses for the plaintiff testify to statements made by the defendant in his speech, which do not appear in the transcript admitted in evidence.

The witness, Lucille Lipman, for the plaintiff, testified that she heard defendant say in his speech that there were no words vile or low enough for him to express his contempt for the atheistic, communistic, Zionist Jews, who were picketing outside of the building, and there were no words low enough for those skunks of Jews that go in; that the Jews were godless; that they had a movement on in this [fol. 2-16] country to destroy the Christian Republic; that we should not say that this country is a democracy, that it is now a democracy run by communist Jews, turned over to them during Roosevelt's administration; that democracy was nothing but mobocracy, and under a democracy these skunks outside of the building would be allowed to vote, under a republic they would not; that she heard defendant say that a non-Jewish doctor, who was in the occupation

army in Germany, told him that they were cutting off the arms and legs of Germans, so that they could not have another war, and that Jewish nurses were inoculating German women and children with syphillis and typhus germs and other disease germs.

The witness Latimer said that he heard the defendant in his speech refer to those who were supposedly amputating the limbs of all Germans they could get hold of, as non-Christian nurses and non-Christian doctors.

The transcript of the shorthand reporter, appearing in this record, does not purport to record everything that was said on everything that occurred at the meeting. The transcript does not contain the speeches of Gerald L. K. Smith, or Mr. Kister, both of whom preceded the defendant in the speaking program. It does contain a statement by Mr. Smith that they were going to take up an offering for defendant, and that there was discussion to stimulate the offering, which was not reported in the transcript. The transcript contains only the speech of the defendant. That the shorthand reporter was not accurate in her transcription is clearly disclosed by the many inaccuracies defendant pointed out while on the witness stand and which, by agree- [fol. 2-17] ment of counsel, were corrected in the transcript. It is not surprising if she did not include everything that transpired at the meeting, nor that she did not get all that was said by defendant in his speech. It is to be expected that she could, under such circumstances, fail to get all that was said, when there was so much confusion, turmoil and chaos, missiles thrown and windows broken.

Mrs. Dilling, for the defense, who was sitting on the platform during the meeting, testified that while the defendant was speaking the howling sometimes drowned out the speaker's voice. She heard someone in the rear of the hall get up and say, "You are a God damned liar" that the disturber was ushered out by the police. That statement does not appear in the transcript of the shorthand reporter.

Another witness for defendant, Florence Griesel, testified that she heard as much of the defendant's speech as she could with the noise going on in the back of the hall and trying to get in; that "There were times when I could not hear very much for the missiles outside."

Many of the witnesses for defendant testified that they did not hear some of the things the plaintiff's witnesses

testified they heard as a spontaneous reaction during the speech of defendant. The witness Lucille McVicker Lippman testified that when the defendant made the statement that there was no crime too great for the Jews to commit, the woman next to her said, "Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us"; and that when he made reference to the Jewish nurses inoculating German women and children with syphillis and typus germs and other disease germs, she heard people around her say, "Oh, that is terrible", "That is a terrible [fol. 2-18] thing"; that at another point in his speech she heard one in the audience say that if the Jews were not killed first, they would kill the Christians.

Ira Latimer testified that during the speech of the defendant, when he made reference to the story of the non-Christian doctors and nurses, he heard expressions of anger from the audience; that he heard a man in the back of him say that the Jews, "niggers" and Catholics would have to be gotten rid of; that at that point one man was ejected from the hall at the instance of a number of women, who pointed to him and appeared to be in conversation with him; that he heard various howls, hoots, cries and shouts at various points in his speech; that he heard comments by people in the hall during the course of the speech; that when defendant spoke of the slimy scum and skunks, he heard people in the hall shout and cry out, "Tell them, Father", or "That is right". On cross-examination he testified that the audience was not calm; that they were disturbed and angry.

Karel, a witness for the plaintiff, testified that when he heard the defendant say that the Zionistic Jews were threatening to undermine our country and should all be sent back to Russia where they came from, he heard people around him in the audience holler, "Yes, send the Jews back to Russia. Kill the Jews"; "Kill the Jews"; "Dirty Kikes"; that when defendant referred to the Morganthau plan to starve the German women and children, he heard some of the audience say, "They ought to starve the Jews"; "They ought to kill Morgenthau", "They ought to do the same thing to him that he is doing to the Germans"; that he did not yell out, "You are a God damned liar", but that he [fol. 2-19] heard someone get up and make that statement; that on every occasion, when the people stood up while defendant was speaking, they applauded and they made

violent shouts, such as "Dirty kike, kill the Jew, send them back to Russia."

Whether these witnesses heard what they claimed in their testimony, and how much reliance could be placed upon their testimony, was clearly within the province of the jury, who heard and saw all the witnesses. It is not for us, upon this record to suggest that the jury should have believed the witnesses for the defendant and not those for the plaintiff, especially when there is so little conflict upon material matters. As we have pointed out, there is much corroboration of the plaintiff's witnesses as to what they heard and saw of the happenings on the outside and inside of the meeting hall.

It was in this setting and surrounding atmosphere, an atmosphere full of lawlessness, mob excitement, with an audience, as we have pointed out, stirred to emotional reaction, that the defendant delivered his speech. The jury heard from the defendant that he had previously had difficulty of the same character in the City of Cleveland, where he undertook to address a meeting and was threatened and surrounded. The announcement in the invitation to the meeting stated: "The same people who hate Father Coughlin hate Father Terminiello. They have persecuted him, hounded him, threatened him, but he has remained unaffected by their anti-Christian campaign against him."

The jury had a right to believe that the defendant knew that the very presence of Gerald L. K. Smith with him at a meeting of this type would likely produce a mob gather-[fol. 2-20] ing and mob resentment and violence, for he pointed out in his speech, referring to Gerald L. K. Smith, that he, the defendant, did not have the courage of Mr. Smith, who day after day, month after month, and year after year, went out and faced the same howling mob, and that in Cleveland it was first brought home to defendant the realization of the danger he faced. Knowing all this, and the likelihood of the effect that such a speech as the instant one would have upon an audience under such conditions, we do find that defendant's speech and conduct not only had a tendency to create a diversion tending to a breach of the peace but, in reality, there was created such a diversion and breach of the peace. No other reaction could reasonably be expected when we find this statement in his speech: "We are in for a profound revolution. *Those*

of us who realize the inevitableness of the revolution and are anxious that it be gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody"; and the further statement in his speech: "* * * and millions more through Eastern Europe at the close of the war are being murdered by these murderous Russians, hurt, being raped and sent into slavery. *That is what they want for you, that howling mob outside.*" If these statements, coupled with the rest of his speech, are not an appeal to fury and an incitement to disorder and violence, then these words lose their English meaning. Even the defendant admitted upon cross-examination that the statement he made about the slimy scum that got in by mistake was an intemperate remark about the conditions that existed.

Is a speech like the one delivered by the defendant, and under the circumstances indicated, protected by the Constitutional guarantee of freedom of speech? The Supreme [fol. 2-21] Court of the United States has uniformly held that there are limits to the exercise of freedom of speech guaranteed by the Constitution.

In *Cantwell* v. *Connecticut*, 310 U. S. 296, where the Constitutional guarantee of freedom of speech was invoked and sustained, the court had this to say at page 308:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts *but acts and words likely to produce violence in others.* No one would have the hardihood to suggest that the principal of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect." (Italics ours.)

On page 309, the court said:

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or makes statements likely to provoke violence and disturbance of good order, *even though no such eventuality be intended.* Decisions to this ef-

fect are many, but examination discloses that, practically all, *the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.*" (Italics ours.)

[fol. 2-22] At page 310, the court said further:-

"There are limits to the exercise of these liberties. The danger *in these times* from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal by events familiar to all. These and other transright to the exercise of their liberties, is emphasized gressions of those limits the States appropriately may punish." (Italics ours.)

To the same effect, *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

It is urged by defendant in argument that there was no intention on his part to stir up class prejudice, religious hatred and violent reaction in his listeners; that he did not limit himself to the Communistic or Zionist Jew alone; and pointed to the statement made by him in his speech that he has the Christian attitude and wants his listeners to have the same attitude, and urges them to have no hatred and not to leave the meeting with hatred. If the jury, who saw and heard the defendant testify, concluded that he was not sincere in those statements, that it was a familiar trick of speech, used by experienced and professional agitators for their own protection, then such statements cannot overcome the appeal to fury, emotion, and disorder, which the rest of the speech, as already pointed out, accomplished, and the jury could well reject the claim of good faith made for the defendant.

We are convinced that the defendant is shown by the evidence in this record to be a professional agitator, who, by his own testimony and the statement in the invitation to [fol. 2-23] the meeting, admits he has been touring the

country in this type of crusade. Defendant also admits that he has been suspended as a Catholic priest by his Bishop and stripped of his clerical prerogatives in the church. That he is a paid agitator is evidenced by the fact that a collection was made up in the instant meeting for the defendant.

The power of speech for good or evil has been recognized since the existence of civilization. Byron wrote:

> "Religion—freedom—vengence—what you will, A word's enough to raise mankind to kill."

It is no longer open to dispute that under the Constitution one may speak or write freely upon any controversial question, concerning State policies, religion, politics, social, economics, or any other subject, and that this right, so paramount, must be protected. In all cases of doubt, the doubt should be resolved under the Constitution in favor of the right, provided, however, that one is not permitted, as shown by the authorities, to use the Constitutional privilege as an instrument for abuse and incitement to violence, and go beyond the limits set in the *Cantwell* case.

As said in *National Labor Relation Board* v. *Pick Mfg. Co.*, 135 Fed. (2d) (7th Circuit) 329, at p. 331:

> "The right of free speech is not absolute. It is a relative right. * * * As Justice Holmes once said the right of free speech does not give one the right to yell 'fire' in a crowded theatre. * * *. Free speech does not mean license to speak without restraint."

The demonstration on the outside of the meeting hall is one we must condemn as un-American and as clear a violation of law as can come to the observation of any court. [fol. 2-24] Many of them were arrested, but the police should have done their full duty by dispersing the mob and suppressing the demonstration. However, this demonstration is no defense to the charge against this defendant.

The reasoning in *People* v. *Burman*, 154 Mich. 150, is directly in point. In that case the defendant was arrested for carrying a red flag through the streets of the city of Hancock, Michigan, in violation of an ordinance which read:

> "That any person who shall make, aid, abet, countenance or assist in making any riot, noise, false alarm

or fire, disturbance or improper diversion or commit any nuisance in any street or alley, or in or on any public or private property within the village to the annoyance or disturbance of citizens or travelers, shall, on conviction, be punished by a fine of not more than $20.00 or by imprisonment for a period not exceeding twenty days, or by both such fine and imprisonment, together with the costs of prosecution, in the discretion of the court."

The defendant was convicted, and on appeal to the Supreme Court, the judgment was affirmed. The court said: (p. 156)

"The question here is not whether the defendants have in general a right to parade with a red flag. It is this: Had they such right, when they knew that *the natural and inevitable consequence was to create riot and disorder?* Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. *They knew that it would excite fears and apprehension* and that by displaying it they would provoke violence and disorder. *Their right to display a red flag was subordinate to the right of the public. They had no right to display* [fol. 2-25] *it when the natural and inevitable consequence was to destroy the public peace and tranquility.* It is idle to say that the public peace and tranquility was disturbed by the noise and violence, not of defendants, but of those whose sentiments they offended. When defendants deliberately and knowingly offended that sentiment, they were responsible for the consequences which followed, and which they knew would follow. It is also idle to say that these others were wrongdoers in manifesting in the manner they did their resentment at defendants' conduct. This merely proves that they and defendants were joint wrongdoers; that they, as well as defendants, violated the ordinance in question." (Italics ours.)

Complaint is made by the defendant that the trial court erred in refusing to admit certain exhibits offered by defendant, which were a number of pamphlets, booklets,

reports, leaflets and publications of one type or another, sponsored by various organizations and individuals. We have examined them and find no relevancy to the charge upon which the defendant was tried. They had no material bearing upon the issue, and none of them could have been used, even for the purpose of impeachment of any of plaintiff's witnesses, since no proper foundation for such impeachment appears in the record to make them competent.

Complaint is made with respect to the instructions given and refused. We have examined them, and we do not find any merit in the complaint to justify setting aside the verdict and judgment.

The judgment of the Municipal Court is affirmed.

Affirmed.

O'Connor, J., concurs.

[fol. 2-26] DISSENTING OPINION

NIEMEYER, P. J., dissents:

The offense charged is a breach of the peace, or a diversion tending to a breach of the peace. As it is not defined by statute or ordinance we must look to the common law for its meaning. Breach of the peace is a generic term, including all violations of public peace or order, and acts tending to promote or excite others to breach of the peace. 8 Am. Jur., Breach of Peace, secs. 3 and 6; Words and Phrases, vol. 5, p. 763; *St. Louis* v. *Slupsky*, 254 Mo. 309; *State* v. *Steger*, 94 W. Va. 576. The acts must be public in character and such as actually tend to disturb the public peace and quiet. *People* v. *Monnier*, 280 N. Y. 77; *People* v. *Perry*, 265 N. Y. 362, 364-365; *People* v. *Reid*, 40 N. Y. S. 2d 793; *People* v. *McWilliams*, 22 N. Y. S. 2d 571. In the present case the speech of defendant must have been delivered in a public meeting or a public place to cause a breach of the peace. The courts have had no difficulty in determining what is a public meeting or place. In the case of *City of Bloomington* v. *Richardson*, 38 Ill. App. 60, 64, cited in the majority opinion, the court was considering a prosecution under an ordinance prohibiting a "public gathering or meeting" upon public streets or public grounds of the city without a permit. It there said, as quoted in the majority opinion and in accordance with the established weight of authority, "that a private meeting may be held on a public place and a public meeting on a private place."

The court then gave an easily understood statement of the essentials of "public meetings" according to the common understanding. It said: "Whether a meeting is such (public) according to that understanding, we apprehend will depend primarily and essentially upon its intended composition, and generally, also, if not essentially, upon its object. It must be open to the general public, that is, to all [fol. 2-27] who may have the opportunity and desire to attend it. To make the opportunity general, some notice of the time and place, intended and adapted to reach the public generally, must be given." We found no case holding that a meeting attendance to which is restricted to invitation or selection is a public meeting, or a meeting rendering a place otherwise private a public place. In all cases where restriction of attendance to invitation has been considered, the meeting has been held not to be public and the place not a public place. In *Terry* v. *State*, 22 Tex. App. 679, the court, reversing a conviction of defendant, an invited guest at a wedding, for disturbing the peace by using loud, vociferous, vulgar and obscene language, cursing and swearing and displaying a knife, said, "The fact that the private residence where the disturbance occurred was at the time, a place where numerous persons had, upon invitation of the owner of the house, assembled on the occasion of a wedding, did not divest the residence of its private character, and deprive it of the protection afforded by the statute under which this conviction was obtained." Likewise in *Austin* v. *State*, 124 S. W. 636 (Tex. Crim. App.), the court reversed a conviction for cursing and swearing at a public place. The evidence showed that persons were at a private home by invitation to a party. There was some evidence that persons closely related to the host attended and that no one going there was forbidden to enter. The court said: "However, the issue was squarely raised that the persons present were there strictly by invitation, and that the house was not thrown open to the public generally. In this condition of the record we think the court should have given the special charge requested by counsel for the appellant, [fol. 2-28] to the effect, in substance, that if they believed and found from the evidence that the place charged in the indictment was not a public place, but a private residence, and that those assembled at such place were there by invitation, then appellant would be entitled to an acquittal. This position seems well sustained by the recent case of

Pugh v. *State*, 55 Tex. Cr. R. 462, 117 S. W. 817." In *State* v. *Rosenfeld*, 111 Minn. 301, in considering a statute prohibiting persons under 21 years to be and remain in a dance house, the court said: "It is true, as claimed by defendants' counsel in this connection, that the statute does not define a dance house; but in the absence of such a definition the term must be construed in accordance with its ordinary usage. So construing it, a dance house is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation." In *Mehlos* v. *Milwaukee*, 156 Wis. 591, 604, it was held proper to prescribe regulations for public dances as distinguished from dances on invitation. In *Finnem* v. *State*, 115 Ala. 106, cited by plaintiff, the court held that a field in the woods one-quarter to one-half mile from the public road, where 75 to 100 persons had assembled to witness a cock fight, was a public place. Among the facts making the field public was the fact that it was not necessary that people should have an invitation to be present, and that anyone who wished could be there. *Coleman* v. *State*, 20 Ala. 51, where the defendant was prosecuted for permitting card-playing in his private room in violation of a statute prohibiting gambling in a public house and other public places, was cited. In that case the court said: "But we cannot hold that the assemblage of eight or ten persons at a private house or room, by invitation, and to which the [fol. 2-29] public have not a right to go, for the purpose either of participating in the amusements going on, or partaking in the social enjoyments, will constitute such private house or room a public place, within the meaning of the act. If we were to hold this, we should be governed in our opinion by the number of persons alone, in determining whether the place was public, without regard to any other consideration. This, I think, would be improper; but we must look to the character of the place, the manner of ingress to it, as well as the number of persons that are, or do assemble at it, in deciding whether it is public or private. Suppose an evening party given, at which a dozen or more were assembled by special invitation, but to which no one could go unless invited, without violating the rules of propriety, would this constitute the house a public place? We think not."

Tested by these rules, the meeting at which defendant spoke was not a public meeting. There is no evidence that

the auditorium had ever been used for meetings to which the public generally was admitted. There is no evidence that the sponsors of the meeting had ever held meetings open to the public generally. There is no evidence that any notice of the time and place intended and adapted to reaching the public generally was given. No admission fee was charged. Admission was by card only. These cards, admitting bearer and one friend, were sent with an invitation stating that a few extra cards were enclosed and requesting the invitee to "make wise distribution of them." Two witnesses for defendant who were taking cards at the door testified that no one was admitted without a card, and there is no evidence to the contrary. These witnesses questioned some with cards who insisted on coming in, but [fol. 2-30] do not say any of these were turned away. Many with cards were denied admission after the hall was filled. The meeting had all the characteristics of a private meeting and none of a public meeting, except that the subjects discussed were of public interest. The majority opinion holds that the meeting had the necessary characteristics of a public meeting. The tests adopted are not supported by precedent and no reasons are advanced to sustain them. They suggest pertinent queries necessarily answered in the negative and proving the fallacy of the position taken.

Is a meeting public or private as the attendance is large or small? Does a meeting intended to be private become public because the sponsors, underestimating the drawing power of the speaker, send out more invitations than are necessary to fill the hall and some of the invitees are denied admission? Is a meeting of a business association or other organization restricted to members and invited guests public non-member guests are selected by the individual members and not by the executive heads? Is a school dance public when the boys choose the girls they take, and does it become private only when the dance committee extends a personal invitation to each girl? Does the character of a meeting as public or private depend upon whether judges and jurors, with their different standards and prejudices, determine that the invitees were indiscriminately or discriminately selected?

There is no evidence that the cards were used indiscriminately either by those sending out the invitations or by invitees who distributed the extra tickets and brought their [fol. 2-31] friends to the meeting. The propriety of the

invitation to Latimer can be questioned only in the light of subsequent events. As the invitation to him was sent to his old address of a year before, he must have been on the mailing list for some time. There is no evidence that up to the time when he left the meeting and swore to the complaint he was unfriendly in thought or deed to the defendant, to Smith, who signed the invitation, to the organization sponsoring the meeting or to the purposes of the meeting. He was invited as a friend. The fact that he came as an enemy and a spy raises no inference against the good faith or judgment of the persons sending the invitation. So far as the evidence shows, only four persons—Latimer, Mrs. Lipman, Karel, and an unidentified man who called one of the speakers a liar—out of 800 to 1,000 present were hostile to the defendant or unsympathetic with his views. These persons may have used cards received by Latimer. There is no evidence or legitimate inference that invitations or cards reached persons other than these four who were not "patriotic friends" of the meeting and those active in it. The presence of these unfriendly persons did not make the meeting public any more than the presence of employers' spies at a meeting of a labor union would make such meeting public and deprive the union members of the right to characterize strike breakers as scabs, etc.

If we accept the majority opinion holding that the meeting was public, it becomes necesary to determine when epithets, abusive and insulting language constitute a breach of the peace. It is universally held that such language does not constitute a breach of the peace unless it tends to incite immediate violence. *People* v. *Most*, 171 N. Y. 423, 427; [fol. 2-32] *St. Louis* v. *Slupsky*, 254 Mo. 309, 318; *State* v. *Steger*, 94 W. Va. 576, 579. In *Ware* v. *Loveridge*, 75 Mich. 488, 492, the court said: "There are, in some of the definitions, references to language tending to provoke a breach of the peace, and relator's claim is based on this. But the authorities have very plainly held that this covers nothing that is not meant and adapted to bring about violence directly. It is laid down, very positively, that insulting and abusive language does not come within the rule, but it must be threats of immediate violence, or challenges to fight, or incitements to immediate personal violence or mischief." In Annotated Cases 1917 C (note p. 889) the author says: "But it seems that at common law language which was not threatening but merely abusive, vulgar or defamatory,

did not constitute a breach of the peace, unless it was of a nature designed to bring about an altercation." In *Cantwell* v. *Connecticut*, 310 U. S. 296, 309, cited in the majority opinion, the court, in harmony with the foregoing rule, said: "One may, however, be guilty of the offense (common law breach of the peace) if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, *the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer.*" (Italics our.) Statutes on the subject are restricted to punishing abusive and insulting language uttered in a public place and in the presence and hearing of the person to which the language applies. *Dyer* v. *State*, 99 Ga. 20; *Holmes* v. *State*, 135 Ark. 187; *State* v. *Hebert*, 121 Kan. 329. The reason underlying these statutes is stated [fol. 2-33] in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. The court had under consideration a statute providing, "No person shall address any *offensive, derisive or annoying word to any other person who is lawfully in any street or other public place*, nor call him by any offensive or derisive name," etc. (Italics ours.) The court quoted from an opinion of the highest court of New Hampshire holding the act constitutional and saying that the purpose of the statute was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."

"The word 'offensive' is not to be defined in terms of what a particular addressee thinks. * * * The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. * * * The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." The Supreme court of the United States likewise held the act constitutional, saying: "It is a statute narrowly drawn and limited to define and punish specific conduct lying within

the domain of state power, the use in a public place of words likely to cause a breach of the peace." Consistently with the rule announced in these cases, the court in *Commonwealth v. Redshaw*, 12 Pa. Co. Ct. 91, drew a distinction between statements made to members of the speakers group and those made publicly in the presence and hearing of the [fol. 2-34] opposition. At a time of great public excitement arising out of the labor troubles defendant called men on the public street "scabs," a fighting word in any labor controversy. The court said: "Where such a state of affairs exists it would not be disorderly conduct for the men of either party, among their own friends and in a reasonable manner, to express their opinions of the men belonging to the opposite party. But for a man of one party to intentionally apply an offensive epithet to a number of men of the other party as they were passing along the public highway, must of necessity, tend to create a tumult and provoke a conflict."

Defendant spoke when the building was surrounded by a belligerent, noisy mob, at least as large as the audience in the hall, seeking by mob violence and threats to deny to those in the hall the constitutional right of peaceable assembly and freedom of speech. His speech must be divided into two parts: the first, or extemporaneous part, in which epithets and abusive and insulting language were directed to the mob outside and such members of the mob as the defendant supposed had gotten into the hall by mistake; and the second, or main speech, which was anti-New Deal, anti-Communistic and anti-Jewish, at least as to some Jews designated as criminal, atheistic, communistic or Zionistic Jews, but not American Jews. Plaintiff introduced in evidence a transcript of the speech as taken by a court reported of 17 years experience in reporting trials, conventions and meetings. By agreement of counsel the transcript as corrected was accepted as the speech made by defendant, and plaintiff's argument here is based on the transcript, which shows that in speaking of the mob defendant used the terms "scum" and "slimy scum." To these epithets Mrs. [fol. 2-35] Lipman, wife of a Director of the Chicago Civil Liberties Committee, of which Latimer is executive secretary, attempts to add, "skunks of Jews." As she admitted on direct and cross-examination that she had heard defendant make a later speech and had the two speeches confused,

her testimony as to what the speaker said has no probative value.

The terms "scum," "slimy scum," and "skunks of Jews," are epithets, abusive and insulting terms. They are not in any proper sense communication of information or opinion safeguarded by the Constitution. *Cantwell* v. *Connecticut*, *supra*, pp. 309-310. When publicly made, as shown by the authorities heretofore cited, they constitute a breach of the peace only when addressed to and within the hearing of the person or persons to whom they are applied because they are words plainly likely to cause a breach of the peace by the addressee in resentment or retaliation. If none of the persons of whom the words were spoken were present and heard the words uttered, there is no breach of the peace. The burden of proving that members of the mob referred to as "scum," "slimy scum," and "skunks of Jews" were present and heard the words uttered concerning themselves, was upon plaintiff. The only possible basis for a claim that some of the mob gained admission is the statement of defendant in his speech that he supposed some had gotten into the hall by mistake, and a later reference to "scum" in the hall by mistake, based upon that supposition. No fact in evidence tends to support the claim that members of the mob got into the hall. The three witnesses for plaintiff deny any connection with the mob. It is not shown that the man who called one of the speakers a liar had any connection with the mob, and it is uncertain whether he was [fol. 2-36] present when defendant spoke. The only person of the Jewish race present was Karel, a witness for plaintiff. None of the words spoken applied to him and he did not take them as applying to himself. No one in the audience showed any resentment, indignation or inclination to fight or breach the peace because of these words. The only evidence as to the reaction of the audience to them is the testimony of Latimer. He testified on direct examination that when reference was made to the mob outside and defendant called them "scum," "slimy scum," "skunks," etc., the audience shouted and cried, "Tell them Father," or, "That is right." This reaction is not indicative of incitement to immediate violence, necessary to make spoken words a breach of the peace. The words were not uttered at a public meeting or in a public place, or in the presence or hearing of any person to whom they were applied. They did not, and under the circumstances of the time and place

when and where they were uttered were not calculated to excite immediate violence.

The remainder of the speech—a bitter denunciation of New Dealers, Communists and Jews, whom it linked together—it protected by the constitutional guarantees of communication of information and opinion. There was little if anything new in it. It did not cause or tend to cause a breach of the peace. The demonstrations of the audience, with the possible exception of the man who may have called defendant a liar, were in hearty approval of what defendant said. One witness for defendant says that the epithet "God damned liar" was uttered when defendant was speaking. Two witnesses for defendant say that it was applied when Smith was speaking. Karel, for plaintiff, heard it but does not state who was speaking at the time. Latimer said [fol. 2-37] that a man was ejected from the hall when Smith or defendant was speaking—he did not recall which. Had the episode occurred at a public meeting, the man calling the speaker a liar, and not the speaker, would have been guilty of breach of peace. No one in the hall was threatened, molested or attacked. Karel is the only witness who testifies to any bitter or violent expressions by the audience. He says that at various times persons in the audience hollered, yelled and shouted,—"Dirty Kike!" "Kill the Jews!" "Send them back to Russia!"—and other expressions noted in the majority opinion. Latimer testified only to the expressions "Tell them Father," or "That is right," heretofore mentioned, and that when the speaker referred to the inoculation of Germans with disease germs, etc., "the people widely across the room said, 'Ah!' and 'Oh' and other expressions of anger." Following the general rules of construction, the "other expressions of anger" heard by Latimer were similar to "Ah:" and "Oh," which are exclamations of mild contempt, wonder, sorrow or shame, and not expressions of anger. Mrs. Lipman says that except "a little commotion when someone was taken out," and "except the clapping of hands, I heard no other noise inside the hall throughout the meeting." The experienced court reporter, who covered the meeting and who was expected to report all that happened and did note the breaking of glass on two occasions during defendant's speech, makes no reference to any of the interruptions and outcries of the audience testified to by Karel. It is significant that plaintiff did not call any of its three or four

uniformed policemen and six plain-clothes policemen which it had stationed inside the hall, to corroborate Karel. [fol. 2-38] Sherer, a director of Latimer's Chicago Civil Liberties Committee, who was present at the meeting, was not called. Jacques, a director and secretary of the American Civil Liberties Union (Chicago Division), who attended the meeting, was not called. Latimer admits that Jacques did not agree with him about the case. Defendant called ten witnesses who were inside the hall, none of whom were more partisan than Karel, Latimer and Mrs. Lipman. Eight of these witnesses denied that the expressions testified to by Karel were uttered. The other two were not questioned on this point. Judged as a whole, the evidence overwhelmingly predominates in favor of the defendant and against plaintiff on the question of hostile or violent demonstrations by the audience.

As to his personal reaction Karel testified that he was aroused when defendant said that he was going to devote his life to clearing up the Pearl Harbor incident. He did not testify that he resented or was moved or aroused by any other parts of defendant's speech. His lack of reaction was similar to that of the two police officers in *People v. Downer*, 6 N. Y. S. 2d 566, where as here the defendant was charged with breach of the peace or tending to cause a breach of the peace. The defendant Downer approached a police officer on a public street and asked the officer to recommend a restaurant not owned and not patronized by Jews, and said, "I am starting a world revolution to kill all the Jews." He also handed to the arresting officer and to another patrolman a typewritten pamphlet headed "World Revolution against the Jew President, the Jew Governor and the Jew Mayor." The court said:

[fol. 2-39] "Both police officers are of the Jewish faith and the place where this occurred, namely, Coney Island, is largely populated by members of the Jewish race. The defendant told the officers that he had distributed about 5,000 copies of this pamphlet.

"There is no evidence in the case that there was an actual breach of the peace. The two officers who received the circulars were not disturbed or annoyed. However, it is contended by the People that the acts of the defendant tended to cause a breach of the peace. . . . These scurrilous attacks have been published and broadcast in our

own city for years without provoking any breach of the peace, and I do not believe that they are apt to do so at this time.

" " " That the circular in question is insulting, intemperate, and highly reprehensible is beyond question. Nevertheless, the acts and conduct of the defendant do not constitute a violation of Section 722 of the Penal Law, no more so than would be the public utterances during a political campaign by the orators of one party charging that the opposition party is dishonest and the enemy of the public, or any more so than the unjustified and indecent writings and oral declarations made from time to time against the adherents and disciples of other religious bodies.'"

The reaction of Latimer and Mrs. Lipman was against the lies that were told. Because of the lies Mrs. Lipman called up and offered to be a witness. Latimer said that he "swore out a warrant for people who tell lies." The truth of the statements made by defendant is not involved here. As said [fol. 240] in *Cantwell* v. *Connecticut*, *supra*, p. 310, "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

There is nothing in the evidence to indicate that the defendant's attitude, bearing or manner of delivery of his speech was bellicose, belligerent, truculent, challenging, or intimidating. His training had been that of a pulpit orator. In parts of his speech he impressed upon his hearers the Christian duty to love the people of all races, limiting his condemnation to the criminal element in the races, and in closing he warned the audience to avoid any controversy with the mob outside and advised them not to stop and argue. Except for the fact that defendant spoke at a private meeting and in a private place, this case and *Cantwell* v. *Connecticut*, *supra*, are strikingly analogous. In that case Cantwell, a member of Jehovah's Witnesses, stopped two

persons on a public street of the City of New Haven and, receiving permission to play a phonograph record, played the record "Enemies," which attacked the religion and church of the two men, who were Catholics. Both were highly offended. One said he felt like hitting Cantwell, and the other that he was tempted to throw him off the street, and one told Cantwell he had better get off the street before something happened to him. Cantwell took up his phonograph and books and walked away. He was convicted of the common law offense of inciting a breach of peace. The con- [fols. 2-41,42] viction was reversed as an abridgment of the freedom of speech, the right to communicate information and opinion. In the present case as in the *Cantwell* case, the breach of the peace, if any, consisted in the effect of defendant's communication upon his hearers and not in any noisy, truculent, overbearing or offensive attitude or conduct of the defendant. There was no statute in Connecticut imposing a penalty for speeches inciting, counseling or promoting hatred, abuse, violence or hostility against any person or persons because of race, color or religion. The court drew a distinction between prosecutions based on the common law concept of breach of peace and prosecutions under a statute "evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated," and concluded, saying: "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." So in the absence of a statute in Illinois, the anti-New Deal, anti-Communist and anti-Jewish parts of defendant's speech, considered in the light of the constitutional guarantees, did not render him liable to conviction of the offense charged against him.

The judgment should be reversed.

[fol. 2-43] POINTS AND AUTHORITIES

I

Disorderly Conduct or a Breach of the Peace Is a Public Offense

8 Am. Jur. Breach of Peace Sections 3 and 6.
Words and Phrases, Vol. 5, Page 763.
St. Louis v. *Slupsky*, 254 Mo. 309.
State v. *Steger*, 94 W. Va. 576.
Majority opinion.
Dissenting opinion.

II

The Acts Relied Upon to Establish a Breach of the Peace Must Be Public in Character and Must Actually Tend to Disturb the Public Peace and Quiet

People v. *Reid*, 40 N. Y. S. (2) 793.
People v. *McWilliams*, 22 N. Y. S. (2) 571.
People v. *Downer*, 6 N. Y. S. (2) 566.
People v. *Ludovici*, 13 N. Y. S. 88.
City of Bloomington v. *Richardson*, 38 Ill. App. 60, 64.
Majority opinion.
Dissenting opinion and cases cited therein.

[fol. 2-44] III

Petitioner's Speech Was Protected by the First Amendment to the Constitution of the United States and by Section 4 of Atricle II of the Constitution of the State of Illinois. To Charge that petitioner Transgressed the Disorderly Conduct Ordinance of the City of Chicago Was a Violation Both of Said Federal and State Statutes and Also in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States

Near v. *Minnesota*, 283 U. S. 697.
Thornhill v. *Alabama*, 310 U. S. 88.
Cantwell v. *Connecticut*, 310 U. S. 296.
Murdock v. *Pennsylvania*, 319 U. S. 105.
Dissenting opinion and cases cited therein.

[fol. 2-45] INACCURACIES OR INSUFFICIENCIES OF STATEMENT OF FACTS BY THE APPELLATE COURT

The majority opinion fails entirely to mention the pertinent fact that the meeting in question was opened and closed with the singing of The Star Spangled Banner, the pledge to the flag and the recitation of Our Lord's Prayer; that all the precautions possible were taken to make the meeting a private one, namely: invitations sent out to known friends of Smith with instructions to distribute *wisely* the enclosed admission cards; there was no public announcement of the meeting in any way.

The meeting was held in a private hall and only those having admission cards were admitted. The audience was calm, cool, though tense, because of the riot on the outside of the meeting hall. Their emotions were not aroused to retaliate, but on the contrary the speaker warned them to disregard all insults and the audience left peaceably and without retaliating to the insults of the mob outside the meeting hall.

No one, neither the speaker's audience nor the mob outside, which could not hear the speaker, were in any way inflamed by the speech of the speaker to commit a breach of the peace, but that long before the speaker even appeared on the scene the mob gathered and created a situation which the majority opinion condemns "as un-American and as clear a violation of law as can come to the observation of any court".

The majority opinion has no basis for finding that peti- [fol. 2-46] tioner was a professional or paid agitator. Petitioner is a Catholic priest who was suspended by his Bishop for his political activities. Suspension in the Catholic Church means that the priest is forbidden to exercise certain privileges and functions, and that petitioner received the least of the four or five degrees of suspension (Abst. 83; Rec. 475).

The majority opinion on the second page thereof states as follows: "The charge grows out of a speech delivered by the defendant" (petitioner herein) "and his conduct at a meeting held on February 7, 1946" etc. This opinion mentions petitioner's "conduct" a number of times. Not once during the proceedings in the lower court was petitioner's *conduct* brought into question, as the abstract of record will affirm. Therefore, the inclusion of this reference to

petitioner's *conduct* in the majority opinion must necessarily be construed as an admission that his speech, standing alone, was not of itself of such a nature as to justify either the charge or the conviction but needed to be bolstered up by a charge of *improper conduct* on petitioner's part. On the other hand, the record reveals that petitioner's conduct while he occupied the rostrum and was delivering his speech was exemplary and that there was nothing objectionable about it, nothing that could by any stretch of the imagination be held to "tend to cause a breach of the peace" by anybody.

Another error typical of the majority opinion, concerns the speaker's reference to communistic Jews (page 22):

> "It is urged by defendant" (petitioner) "in argument that * * * he did not limit himself to the Communistic or Zionistic Jew alone; * * * "

That statement is incorrect. The record reveals that petitioner did limit his criticism of Jews. In his speech, he said (Abst. 32):

> [fol. 2-47] "Now, let me say, I am going to talk about —I almost said about the Jews. Of course, I would not want to say that. However, I am going to talk about *some* Jews." (Emphasis added.)

A little later (Abst. 33) he said:

> "Now this danger which we face—let us call them Zionist Jews if you will, let's call them atheistic communistic Jewish or Zionist Jews, then let us not fear to condemn them."

And still later (Ast. 36), he said:

> "We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jew, and those are not American Jews."

While petitioner was testifying, the lower court sustained objections to the following questions (Abst. 87):

> "Q. Did you intend to make a distinction between what you call good American Jews and communistic Zionistic Jews?
>
> "(Objection)

"The witness answered, 'absolutely'.

"The Court: Sustained. Answer stricken."

"Q. Has it been your intention at any time to condemn the entire Jewish race or the Jewish religion?

"(Objection)

"A. No, sir.

"The Court: Sustained."

[fol. 2-48] SUGGESTIONS

I and II

Disorderly conduct or breach of the peace is a public offense. The acts relied upon to establish a breach of the peace must be public in character and must actually tend to disturb the public peace and quiet.

The complaint upon which petitioner was tried and found guilty was under Sub-Section 1 of Chapter 193 of the Chicago City Code which reads as follows: "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense."

Apparently there are no cases involving this question of "disorderly conduct" in Illinois and both we and the Appellate Court are forced to cite decisions from other states particularly from the State of New York.

The instant case is being appealed because of the great principle involved and petitioner's belief that the application sought to be made of the city ordinance is a gross violation of the freedom of speech and freedom of assembly guaranteed by the Constitutions of the United States and of the State of Illinois.

[fol. 2-49] *The instant case is probably one of first impression in Illinois.*

"Breach of the peace" has been defined as a public offense done by violence or one causing or likely to cause an immediate disturbance of public order. (8 Am. Jur. Breach of Peace Sections 3 and 6; Words and Phrases, Vol 5, Page 763; *St. Louis v. Shipsky*, 254 Mo. 309; *State v. Steele*, 94 W. Va. 576).

"It is well settled that acts charged as disorderly conduct must be public in character, and such as actually tend to disturb the public peace and quiet". *People* v. *Reiff*, 40 N. Y. S. (2d) 795, and cases therein cited). "And that private or individual annoyances are not sufficient to constitute the offense of disorderly conduct". (*People* v. *Perry*, 265 N. Y. 362; *People* v. *Monnier*, 280 N. Y. 77).

In the case of *People* v. *McWilliams*, 22 N. Y. S. (2d) 571, defendant McWilliams was charged with "disorderly conduct" in violation of Section 722, Subsections 1 and 2, of the Penal Law of the State of New York, for making a political speech alleged to have been "anti-Jewish" at 88th Street and First Avenue, New York City. On page 574 that court say:

> "'Acts' charged as disorderly conduct must be *public* in character, and such as actually do tend to disturb the *public* peace and quiet.'" (Emphasis added.) "*People* v. *Monnier*, 280 N. Y. 77, at pages 78 and 79, 19 N. E. 2d 789, 790."
>
> "Under the Constitution of this State, every citizen is entitled to speak freely and to write and publish his sentiments on all subjects and the only responsibility is for the abuse of the right; no law shall be passed that in any way restrains or abridges the liberty of speech or of the press. Article 1, Sec- [fol. 250] tion 8. We have similar provisions in the Federal Constitution. U. S. C. A. Const. Amend. 1. There is no principle under our free democracy that is more firmly entrenched in the fundamental law of the land than the right of free thought and free speech."

In *People* v. *Ludovici*, 13 N. Y. S. 88, the Court said:

> "To sustain a conviction for disorderly conduct under Subd. 2 of Sec. 722 of the Penal Law, the conduct charged must at least be such that a breach of the peace has become imminent or might reasonably be expected or intended to flow from such conduct. People on Complaint of *White* v. *Monnier*, 280 N. Y. 77, 19 N. E. 2d 789. Further, the acts relied upon to establish a breach of the peace, 'must be public in character, and such as actually tend to disturb the public peace and quiet.' *People* v. *Perry*, 265 N. Y. 362, 193 N. E. 175; *People* v. *McCauliff*, 267 N. Y.

581, 196 N. E. 590. Private annoyances, however exasperating or reprehensible, are insufficient where no breach has resulted.

* * * *

"The public was not disturbed, nor could it have been under any reasonable interpretation of the proven facts. Consequently, there was no breach of the peace."

And the court held that "there is no evidence in the case that there was an actual breach of the peace".

In the instant case, to constitute a violation of the City Ordinance involved, the speech of petitioner must have been delivered at a public meeting in a public place to cause a breach of the peace or to "tend to cause" one. As noted in the dissenting opinion, the courts have had no difficulty in determining what is a public meeting or place. The dissenting opinion cites numerous cases, and it is not thought necessary to repeat them. Particular attention [fol. 2-5] is called to the case of *Bloomington v. Richardson*, 38 Ill. App. 60, 64, where the court gave the essentials of public meetings:

> "Whether a meeting is such (public) according to that understanding, we apprehend will depend primarily and essentially upon its intended composition, and generally, also, if not essentially, upon its object. It must be open to the general public, that is, to all who may have the opportunity and desire to attend it. To make the opportunity general, some notice of the time and place, intended and adapted to reach the public generally, must be given."

The meeting in question had none of these essentials. This meeting was not open to the general public; only those could enter who had admission cards, which were mailed to them or which were given to them by friends of the recipient of those cards; there was no general notice of time and place given. A strict check was kept upon those who sought entrance and all of those who entered, with the possible exception of four, who came there as spies, were friends of the speaker and of his ideology. All of the characteristics of the meeting in question were of a "private" meeting, and none of them of a "public" meeting.

On page 4 of the majority opinion is reproduced the "card of admission" distributed by those in charge of the meeting at which petitioner spoke, in their openly announced and very obvious desire to hold a "private" and not a "public" meeting. It will be noted that this "card of admission" states specifically: "*Admission By Card Only.*" It should also be noted, that the invitation to the meeting, reproduced on page 3 of the majority opinion, contains the following paragraph:

> "I enclose herewith a few extra cards." (That is, "admission cards", referred to above.) "These cards [fol. 2-52] will go like hot cakes! Everyone you see will want them. Therefore, *make wise distribution of them.*" (Emphasis supplied.)

The admonition was not, it will be noted, to scatter these cards broadcast, so that the public, generally, might be apprised of the meeting and invited to attend. There is no suggestion that the invitation be posted on some bulletin board or tacked upon some tree, for example, so as to constitute an invitation to the general public to attend. No advertisement of any kind was printed or posted extending such an invitation. The meeting, in truth and in fact, was intended to be and was, a private meeting.

The following, relating to the testimony of Mrs. (Madeline) Kister at the trial and appearing on page 6 of the majority opinion is significant and almost conclusive as to the desire and intent of those sponsoring the meeting that the meeting be a "private", and not a "public" one. Mrs. Kister testified "that they tried to refuse admittance to certain persons, even though they had tickets of admission;". Can one conceivably imagine the "ticket-taker" being selective and attempting to exclude "certain persons" from a "public" meeting? The very idea is preposterous and unheard of.

Mrs. Kister's testimony, further, was "that invitations were sent out, and 'the tickets were just sent to people that we knew, supposedly'." (Abst. 71). By that she meant that invitations to attend the meeting, and tickets or "cards of admission" were sent to people known to those sponsoring the meeting. Surely, this testimony indicates clearly that the meeting was intended to be "private" and "limited to a limited group or set" (to-wit,

[fol. 2-53] friends or acquaintances of those sponsoring the meeting), "discriminately selected," fulfilling the very test as to what constitutes a "private", as opposed to a "public" meeting, enunciated in the majority opinion.

The admonition was to "make *wise* distribution" of the admission cards, connoting the selectivity, care, and discrimination demanded in the majority opinion in order to justify the contention that the meeting in question was a "private" one. Had the admonition actually been to "make *wide* distribution", that discrimination might well be said to have been lacking, lending some justification to the claim in the majority opinion that the meeting was not a "private" one. As is so well stated in the dissenting opinion of the Honorable Presiding Justice (bottom page 30): "There is no evidence that the cards were used *indiscriminately* either by those sending out the invitations or by invitees who distributed the extra tickets and brought their friends to the meeting."

The attention of this Honorable Court is directed to the entire dissenting opinion. Petitioner contends that it is well founded in fact and in law and, further, that it is entirely free from any bias and prejudice that subconsciously and inadvertently may have in part inspired the majority opinion because, on the one hand, petitioner stands so clearly accused herein (he thinks, unjustly and falsely) of being "anti-Jewish", and because, on the other, the Roman Catholic Church, of which petitioner is a priest, deemed it necessary to discipline him for what he considered to be purely patriotic, political activities, a fact that the lower court permitted to be given repeated undue and exaggerated emphasis.

Petitioner contends that the meeting in question was [fol. 2-54] "private" and not "public", and that the record herein conclusively bears out this contention. He also contends that only by attempted distortion of that record can that established contention as to the complexion of said meeting be negated or altered.

In the middle of page 8, the majority opinion contains the following significant statement:

> "We have examined the cases cited by the defendant" (petitioner herein), "and we have no quarrel with the principles laid down by these cases that the declaration must be a public one, * * *".

Hence, this Honorable Court, ignoring the erroneous contention of the majority opinion based, as revealed above, upon distortion (perhaps inadvertent) of the record, that the meeting was a "public", and not a "private", one, should at this point, and without even considering what follows in this petition, grant this petition for leave to appeal herein, as the necessary first step in seeing that justice, finally, is done to petitioner by the reversal of his unjust conviction.

On page 8, the majority opinion again erroneously refers to petitioner's "conduct" while he was delivering his speech at the meeting in question. As already noted above, the propriety of petitioner's "conduct" was never once questioned by anyone during the trial in the lower court. On the other hand, as has also been noted, the record reveals his conduct to have been exemplary.

Let us assume for the moment that petitioner's conduct at that time had been improper and such as might logically be alleged to be a "diversion tending to a breach of the peace." No such "improper conduct" was either [fol. 2-55] alleged or proven. He was not convicted for having conducted himself improperly. He was convicted merely for making a speech that was displeasing to certain persons who disagree with him in politics and religion. That speech, petitioner respectfully contends, was, and is, protected by the Constitutions of the United States and the State of Illinois. The whole, exact quotation from the majority opinion is as follows:

> "We come to the next question, whether *his conduct* and his speech constituted a breach of the peace or diversion tending to a breach of the peace, and whether it is protected by the Constitutional guarantee of freedom of speech."

Thus the majority opinion, at least by inference if not directly, holds that *conduct*, as well as *speech*, allegedly constituting "a breach of the peace or diversion tending to a breach of the peace" might be "protected by the Constitutional guarantee of freedom of *speech*." How ridiculous and unjudicial!

Petitioner respectfully states to this Honorable Court that his conduct on the evening of February 7, 1946, was in no sense, and at no time improper, and that had he

been guilty at that time of any conduct that could by the farthest stretch of the imagination have been construed to be "a breach of the peace or diversion tending to a breach of the peace", he would not have besought the protection of the Constitution that he honors and reveres, there would have been no appeal from the conviction herein in the first instance, and he would not now be here before this august body, petitioning for leave to appeal, further, from the opinion upholding his wrongful conviction herein. He would have bowed to the verdict of the jury and paid the fine levied against him, [fol. 2-56] which is comparatively insignificant when compared with the cost of prosecuting an appeal as far as may be necessary to secure that vindication to which he feels justly entitled and to eliminate the possible far-reaching effect that his wrongful conviction might have, were it allowed to stand unchallenged, upon those sacred liberties guaranteed to us, for which our forefathers bled and died. In fact he would no doubt have accepted at the very outset the proposition of respondent that he plead guilty and accept a fine of One Dollar, thus sparing himself the worry, humiliation, inconvenience, and expense that his wrongful prosecution and conviction have entailed.

The majority opinion presents a very fair and accurate "picture" of conditions that prevailed outside in the vicinity of the meeting hall before and during the meeting, so much so that it should not be difficult for this Honorable Court to determine where the real lawlessness was and who the real lawbreakers were on that evening. The distinguished Jurist who wrote the majority opinion felt impelled to include the following in it:

> "The demonstration on the outside of the meeting hall is one we must condemn as un-American and as clear a violation of law as can come to the observation of any court. Many of them were arrested, but the police should have done their full duty by dispersing the mob and suppressing the demonstration."

The record reveals that there was no lawlessness inside of the meeting hall while petitioner was speaking, or at any time; that there was no "breach of the peace" inside

of the meeting hall, and that nothing in petitioner's speech nor anything that occurred while he was speaking could, by [fol. 2-57] any stretch of the imagination, be held to create "a diversion tending to a breach of the peace." The disorder inside of the hall alleged by some of respondent's witnesses to have occurred simply did not take place. *If it had, the court reporter's minutes and transcript would have recorded it.* Her transcript would also have recorded the incident about someone rising in the audience and yelling, "You are a God-damned liar!", had it occurred while petitioner was speaking. Some of petitioner's witnesses testified that said incident occurred while Mr. Gerald L. K. Smith was speaking, before petitioner spoke. The lack of reference to it in the court reporter's transcript of petitioner's speech bears out these witnesses. No doubt reference to it would be found in the court reporter's transcript of Mr. Smith's speech, which she also took down and reported. It is interesting to note that the dissenting opinion affirms precisely the attitude heretofore taken by petitioner with regard to said episode, in the following words: "Had the episode occurred at a public meeting, the man calling the speaker a liar, and not the speaker, would have been guilty of breach of peace."

The dissenting opinion, apropos to these same matters, contains the following statements:

> "The experienced court reporter, who covered the meeting and who was expected to report all that happened and did note the breaking of glass on two occasions during defendant's" (petitioner's) "speech, makes no reference to any of the interruptions and outcries of the audience testified to by Karel." (One of respondent's witnesses.)

And:

> "Judged as a whole, the evidence overwhelmingly predominates in favor of the defendant" (petitioner [fol. 2-58] herein) "and against plaintiff" (respondent herein) "on the question of hostile or violent demonstrations by the audience."

The majority opinion is replete with other inaccuracies. Most glaring and unfair is the one that attempts to

tribute to petitioner a quotation in the speech from one Honorable Henry A. Wallace's speeches.

The attention of the Court is respectfully directed to bstract 25 and 26, that portion of Respondent's Exhibit the court reporter's transcript of petitioner's speech, lating to the Wallace quotation, as follows:

"Then we have Heary Adolph Wallace, the sixty million job magician. You know we only need fifty-four million jobs in America and everybody would be working. He wants sixty million jobs, because some of the bureaucrats want two jobs apiece. Here he is, what he" (Mr. Wallace) "says about revolution: 'We are in for a profound revolution. Those of us who realize the inevitablenss of the revolution, and are anxious that it be gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody.'"

Petitioner testified (Abs. 92):

"Henry Adolph Wallace, on page 43, Ex. 31, should be Henry Agaard Wallace. I did not call him Adolph."

The quotation marks, of course, indicate clearly that ese words are someone else's and not petitioner's. The ajority opinion, on the bottom of page 12, recognizes at fact for the words of Mr. Wallace are there stated ithin single quotes. However, the words, "if necessary, e will have it more bloody", are emphasized. The pur-se of this does not become clear until later in the ol. 2, 501 opinion where the entire Wallace quotation is ainly attributed to petitioner and all of the words except e first seven are emphasized. Further, the following roneous finding is there made: " * * * we do find that tendant's" (petitioner's) "speech and conduct" (an-ke of the repeated attempts that the majority opinion akes to go outside of the record, as it were, and bring to question petitioner's *conduct*, which at no time was estioned during the trial in the lower court but which, the other hand, the record reveals to have been exem-lary, something truly surprising and remarkable in ew of the abnormal conditions that prevailed outside the meeting hall, vitally affecting the atmosphere inside e hall, as well, so well and fully depicted and recognized

in the majority opinion itself occasioned by the vicious criminal attempts of the real lawbreakers outside of the hall, in the first place to prevent the meeting, and secondly, to break it up after it had started, in complete defiance of the sacred guarantees of freedom of speech and freedom of assembly; apparently, as already noted, the distinguished jurist who wrote the majority opinion believed it necessary to question petitioner's conduct, too, in order to bolster up the charge of breaching the peace, or creating a diversion tending to breach the peace, which petitioner's speech alone utterly fails to warrant or support, "not only had a tendency to create a diversion tending to a breach of the peace but, in reality, there was created such a diversion and breach of the peace." It is clear from what follows immediately that this erroneous finding was based in large measure upon the words of Mr. Wallace, wrongfully attributed to petitioner. For the opinion goes on: "No other reaction could reasonably be expected when we find this statement in his" (petitioner's) "speech: 'We are in for a profound revolution. [fol. 2-60] *Those of us who realize the inevitableness of the revolution; and are anxious that it be gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody*'; . . . . . "

This example well illustrates the distortion of the record upon which the erroneous findings in the majority opinion are based. Be that distortion deliberate or inadvertent, it should nevertheless cause this Honorable Court, forthwith, to grant this petition for leave to appeal, as the first step in according justice, at long last, to petitioner by reversal of the erroneous, and unwarranted majority decision of the Appellate Court, and affirmance of the correct, logical and entirely dispassionate views presented by the Presiding Justice in his dissenting opinion. That opinion, standing alone, affords a sound legal basis for such action by this Honorable Court. Such action would not only render to petitioner that justice to which he is entitled; it would, in addition, reaffirm those high principles enunciated by the Supreme Court of the United States guaranteeing freedom of speech and freedom of assembly, to which said majority opinion does violence, and, incidentally, rebuke and render for naught the unconscionable attempt of respondent

herein to destroy and nullify those sacred freedoms through a perverted, unlawful use and application of a "disorderly conduct" ordinance.

III

Petitioner's speech was protected by the First and Fourteenth Amendment to the Constitution of the United States and by the Constitution of the State of Illinois.

Even should the meeting in question be considered a public meeting, which petitioner feels has been empha- [fol. 2-61] tically negatived the dissenting opinion and by what has been said herein, still the language of petitioner's speech was not such as would tend to create a breach of the peace. It is generally held that a speech, mere language, is no violation of "breach of the peace" ordinances, unless it tends to incite immediate violence. (*People* v. *Most*, 171 N. Y. 423, 427; *St. Louis* v. *Slupsky*, 254 Mo. 309, 318; *State* v. *Steger*, 94 W. Va. 576; *Ware* v. *Loveridge*, 40 Mich. 488, 492, all cited in dissenting opinion).

Petitioner can do no better that to call this Court's special attention to the dissenting opinion and particularly to the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, at pages 303, 304, 308 and 311.

The *Cantwell* case is cited with extensive quotations from the opinion therein in the majority opinion, but it certainly in no way supports the majority opinion. Petitioner submits that the *Cantwell* case, on the other hand, presents the best answer to respondent. If what Cantwell did was not of such a nature as to "tend to breach the peace", it is futile to argue that anything contained in petitioner's speech was of such a nature. Cantwell's affront was to two persons of the Roman Catholic faith which made them most susceptible to insult by the playing of the phonograph record in question. Petitioner in the instant case simply made a general speech to an audience numbering about 800 persons. In this speech there was an exposition of ideas. And the speech contains an invitation to the audience as a body to join in the Christian program that the speaker had launched and was carrying on. The speech contains no personal epithets and no personal abuse of anyone. It is entitled to the protection afforded by the Constitutions of the United States and of the State of Illinois.

[fol. 2-62] The case of *Near* v. *Minnesota*, 283 U. S. 697, is such an important case, involving the freedoms guaranteed by the First and Fourteenth Amendments to the United States Constitution, that we may be pardoned in quoting from it at greater length than might seem necessary. Though the freedom involved is "freedom of the press", the case is equally applicable to the case at bar, in which "freedom of speech" is primarily involved. It should be clear that "freedom of assembly" and the right to petition the government for a redress of grievances are likewise threatened in the case at bar.

The newspaper sought to be restrained and enjoined in the Near case, "The Saturday Press", contained "matter attacking certain Minneapolis newspapers, certain Minnesota politicians and 'the Jewish Race'," contrary to the provisions of a certain statute. The articles "charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." "An attempt was made to assissinate one Guilford, one of the owners of "The Saturday Press". On page 707 Chief Justice Hughes said:

> "It is no longer open to doubt that the liberty of the press, *and of speech*, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Stromberg* v. *California*, *ante*, p. 359."

[fol. 2-63] According to the State court, as reported in the opinion on page 709, the statute was "aimed at the distribution of scandalous matter as 'detrimental to public morals and to the general welfare', tending 'to disturb the peace of the community' and 'to provoke assaults and the commission of crime.'"

On page 717 in speaking of "previous restraint," the court says:

> "The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraint has been approved in many decisions under the provisions of state constitutions."

"Previous restraint" on freedom of speech likewise violates a constitutional right. If the City Ordinance of the city of Chicago, involved in the case at bar, were to be upheld and sought to be enforced, it would operate as a "previous restraint" on all speakers in the City of Chicago who might desire to exercise their right of free speech and, in so doing criticize crime and corruption on the part of public officials or express views unpopular to well-organized minorities seeking to suppress criticism and impose their arbitrary will on the people of this country. Surely, if the conviction and fine imposed upon petitioner in the lower court is upheld, it will act as a "previous restraint" upon further speaking on his part in the City of Chicago and thus, in utter disregard of both the State and Federal Constitutions, depriye him of his freedom of speech.

That court then goes on to say on page 721:

> "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke as- [fol. 2-64] saults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication: 'To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct.'" (From: Report on Virginia Resolutions, Madison's Works, Vol.

IV, page 549.) "There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung* v. *Nolan*, 89 N. J. Eq. 387, 388, 105 Atl. 72: 'If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.' The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words."

Judgment was reversed, in a "5 to 4" decision, and it interesting to note that though the articles complained ol. 2-65] of attacked Jews far more so than anything spondent sought to "read into" appellant's speech, as ay be seen by reference to said articles, still the late Mr. stice Brandeis, a Jew, held with the majority in reversg the lower Court and in upholding the right of freedom speech and of the press."

In the case of *Thornhill* v. *Alabama*, 310 U. S. 88, yron Thornhill was convicted in the Circuit Court of uscaloosa County, Alabama, of violating Section 3448 the State Code of 1923, entitled "Loitering or picketg forbidden." He was first charged and convicted in e Inferior Court of Tuscaloosa County and sentenced 30 days in jail in default of payment of a fine of $100 d costs. Appeal to Circuit Court resulted in a sentence imprisonment for 73 days in default of payment of a e of a like amount.

From the opinion by Mr. Justice Murphy, at page 95, the llowing is quoted:

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are se-

cured to all persons by the Fourteenth Amendment against abridgement by a State.

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of [fol. 2-66] speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. * * * It is imperative that when the effective exercise of these rights is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations. *Schneider* v. *State*, 308 U. S. 147, 161, 162.

age 97):

It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota*, 283 U. S. 697, 713. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. *The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit*

their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview. (Emphasis supplied.)

That is exactly the situation we have in the case at bar. The prosecuting officials of the City of Chicago seek to deprive petitioner of his freedom of speech by a perverted, illegal use of a "disorderly conduct" ordinance. If they are permitted to succeed, further abuses are not [fol. 267] hard to envision. It may act to end the "two-party", or "multi-party", system under which this country has prospered and become great. It is easy to picture democrats seeking, and obtaining, the arrest and conviction of their republican opponents because of offensive sentiments expressed at some rival political rally, an abuse of the ordinance and of the rights of free speech and free assembly no more flagrant that that in the case at bar.

On Page 101 of the *Thornhill* case the Court says:

> "*Fourth.* We think that Section 3448" (the statute involved) "is invalid on its face.
>
> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

And concluding that Court say (page 104):

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

In *Murdock v. Pennsylvania (City of Jeannette)*, 319 U. S. 105, petitioners, "Jehovah's Witnesses", went about from

door to door in the City of Jeannette, distributing literature and soliciting people to "purchase certain religious [fol. 2-68] books and pamphlets, all published by the Watch Tower Bible & Tract Society". A local ordinance provided that a license had to be secured before such activities could be carried on. The books were sold for 25 cents each and the pamphlets for 5 cents each; lesser sums were accepted and in some instances the literature was donated. Petitioners carried a phonograph on which they played records expounding their views on religion. The phonograph and records, also, were sold by the Watch Tower Bible & Tract Society. The Court there said (page 108):

> The First Amendment, which the Fourteenth makes applicable to the states, declares that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." It could hardly be denied that a tax laid specifically on the exercise of those freedoms, would be unconstitutional, yet the license tax imposed by this ordinance is, in substance, just that.

(Page 113):

> The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, *supra* (308 U. S. 147); *Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Largent* v. *Texas*, 318 U. S. 418; *Jamison* v. *Texas*, *supra* (318 U. S. 413).

So, also, is the attempt by respondent in the case at bar to make mere speech the offense of "disorderly conduct" a bold sally into the field of censorship, and it, too, should be struck down with equal emphasis and certainty.

[fol. 2-69] (Page 115):

> The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because

it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality of treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

Considerable emphasis is placed on the kind of literature which petitioners were distributing, its provocative, abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See *Douglas* v. *Jeannette*, concurring opinion, *post*, p. 166. But those considerations are no justification for the license tax which the ordinance imposes.

In the absence of a statute in Illinois the disorderly conduct ordinance cannot be invoked to convict the petitioner for his anti-New Deal, anti-communistic, and anti-Zionistic Jewish parts of his speech.

In *Thomas* v. *Collins*, 323 U. S. 516, a Texas statute required labor organizers to register with and procure an organizer's card from a designated State official before soliciting membership in labor unions. While a State court order restraining Thomas from violating the statute was in effect, he made a speech before an assemblage of workers. At the end of his speech, he urged his hearers, generally, to join a union, and also asked an individual by name to become a member. He was sentenced to a fine and imprisonment for contempt of court.

[fol. 2-70] In the opinion written by Mr. Justice Rutledge he says (518):

> For reasons to be stated we think the statute as it was applied in this case imposed previous restraint upon appellant's rights of free speech and free assembly and the judgment must be reversed.

So, in the case at bar, it is not necessarily the city ordinance in question that is unconstitutional but the application sought to be made of it, to deny to petitioner his rights of free speech and free assembly. There was of course no "previous restraint" so far as petitioner's speech of February 7, 1946, was concerned, but his wrongful conviction, if upheld by this Court, will most certainly operate as a "previous restraint" upon future rights of free speech and

free assembly, not only those of petitioner but of many others.

Justice Rutledge concluded the opinion with this eloquent paragraph (page 543):

> The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic right of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty. Judgment reversed.

[fol. 2-71] CONCLUSION

Petitioner maintains that the judgment of the lower court should be reversed, first, because the meeting at which he spoke was a private and not a public meeting and, secondly, because his conviction is in derogation of the great principle of freedom of speech and freedom of assembly. On this last issue alone, should the others fail, petitioner is entitled to have his conviction set aside and the complaint dismissed.

It is apparent from the record that there was a plot to deprive certain American citizens, including petitioner, of their sacred rights of free speech and free assembly. This plot should not be permitted to succeed. The plotters, who were responsible for the actual, vicious lawlessness that the record herein shows occurred around the meeting hall where petitioner spoke that night, and that is even recognized and commented upon in the majority opinion, should be sternly rebuked and petitioner's wrongful conviction nullified and set aside by this Honorable Court, so that the peace and good order of the City of Chicago and the State at large will be permanently protected from such lawlessness, so that the jointly announced purpose of groups like the Sentinel and the so-called Chicago Civil Liberties Committee to prevent free speech and free assembly in Chicago (Abst. 96, 97) may be defeated, and so that the attempt by the City to destroy that free speech and that free

assembly through an unlawful application of the disorderly conduct ordinance may be stopped forthwith.

[fols. 2-72-3] Petitioner respectively prays that the judgments of the Appellate Court and the Municipal Court of Chicago be reversed.

The judgment of the Appellate Court in this case from which this petitioner seeks leave to appeal became final on July 5, 1947. This petition is filed herein with forty days from said date.

Respectfully submitted, Maximilian J. St. George, Albert W. Dilling, Attorneys for Petitioner.

[fol. 4-1] In the Supreme Court of Illinois, September Term, A. D. 1946

City of Chicago, Appellee,

vs.

Arthur Terminiello, Appellant

Appeal from Municipal Court of Chicago

Honorable John V. McCormick, Judge Presiding.

Abstract of Record — Filed August 14, 1947

Order for Issuance of Warrant

Placita.

Order of February 8, 1946 by Oscar S. Kaplan, one of the judges of the Municipal Court, on the complaint of Ira Latimer, that a warrant issue against the defendant, and that defendant deposit cash in the sum of $200 and real estate $400, in lieu of bail.

Complaint

Complaint of Ira Latimer, filed February 13, 1946, that the defendant on February 7, 1946, in Chicago, (1) Did make or aid in making an improper noise or diversion [fol. 4-2] tending to a breach of the peace, within the limits of the city, in violation of Chapter 193, Section 1, Sub-Sec. 4, of the Revised Code of 1939 as amended. This complaint is sworn to on February 8, 1946, by Ira Latimer before

Leetis, Deputy Clerk of said Court. Cash deposit $200, real estate $400. Leave given to file said complaint and warrant ordered to issue by Oscar S. Kaplan, Judge of the Municipal Court of Chicago.

Warrant filed on February 13, 1946, for the arrest of defendant for violation of said ordinance; said warrant is dated February 7, 1946.

ORDER TRANSFERRING CAUSE

Order entered February 13, 1946, by Judge Laczak, transferring said cause to the Chief Justice of said court for reassignment for Jury trial.

Order entered February 14, 1946, by Judge Scheffler, ordering individual bond.

ORDER SETTING CAUSE

Order entered February 14, 1946, setting said cause for trial in Room 1114 before Judge McCormick on March 4, 1946.

Notice filed by plaintiff March 1, 1946, asking that said cause be set for trial at a later date.

ORDER RESETTING CAUSE

Order of March 1, 1946, by Judge McCormick postponing said cause and setting it for trial on March 27, 1946.

TRIAL

March 27, 1946. The Jury impaneled and sworn and the trial commenced.

March 28, 1946. Trial of said cause.

March 29, 1946. Trial of said cause.

April 1, 1946. Trial of said cause.

April 2, 1946. Trial of said cause.

VERDICT

[fol. 43] April 3, 1946. Trial of said cause. Jury returned the following verdict: "We, the Jury, find the defendant guilty of a violation of the ordinance described in the complaint herein and assesses a fine against the defendant in the sum of one hundred dollars ($100.00)." Motion for finding for defendant notwithstanding verdict and motion for new trial and motion in arrest of judgment entered and set for April 8, 1946.

April 3, 1946. Verdict filed with the Clerk of the Court finding defendant "guilty in the manner and form as set forth in the complaint and fix his penalty in the sum of $100.00," signed by twelve Jurors. (No designation of any one of the Jurors as foreman.)

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, ETC.

Motion of defendant for judgment notwithstanding the verdict or in the alternative for a new trial, med April 8, 1946, on the following grounds:

1. Under the evidence at the end of the evidence for the City it was the duty of the court to direct a verdict for defendant without submitting the case to the jury.

2. Under the evidence at the end of all the evidence in this case it was the duty of the court to direct a verdict for the defendant without submitting the case to the jury.

3. The speech of defendant was not a violation of the ordinance in question.

4. No other violation was alleged in the complaint and no other violation of said ordinance was proven by the evidence, except said alleged speech of defendant, and said speech was protected by the First Amendment to the Con- [fol. 4-4] stitution of the United States as well as the Constitution of the State of Illinois, Article II, paragraph 4.

5. That to attempt to charge a violation of said ordinance by the making of said alleged speech of defendant is in violation of the due process clause of the 14th Amendment to the Constitution and the Constitution of Illinois.

6. The court improperly gave to the jury the instructions objected to by defendant.

7. The court erred in refusing to give certain instructions requested by defendant.

8. The argument of the prosecutor was prejudicial.

9. The verdict is contrary to the law; it is contrary to the evidence; it is contrary to the law and the evidence.

ORDERS AND JUDGMENTS

Orders entered April 8, 1946. Motion of defendant for finding notwithstanding the verdict overruled. Motion of

defendant for a new trial overruled. Motion of defendant for arrest of judgment overruled. Judgment on verdict. Defendant fined $100 and $10 costs. Appeal prayed and allowed. Bill of exceptions to be filed within sixty days. Appeal bond $500.00 instanter.

Bond

April 8, 1946. Appeal bond of defendant with the United States Fidelity and Guaranty Company as surety in the sum of $500.00 filed and approved by the court.

Notice of Appeal

Notice of appeal to the Supreme Court of Illinois and proof of service filed April 14, 1946, with the Clerk of said Municipal Court, praying that the judgment of the Municipal Court be reversed and that the motion of appellant for [fol. 4-5] judgment notwithstanding the verdict be granted.

Praecipe for Record,

April 25, 1946, praecipe and proof of service filed with the Clerk of said Municipal Court.

Praecipe for complete record and proof of service.

Stipulation as to Record

April 25, 1946 stipulation to incorporate the original of the transcript of the proceedings in said cause instead of copy thereof.

Order Extending Time

Order of June 5, 1946, extending the time for filing the transcript of proceedings to and including June 24, 1946.

Order of June 21, 1946, that the trantscript of proceedings presented be approved and ordered filed.

June 21, 1946, Report of Proceedings filed with the Clerk of said Municipal Court.

Transcript of proceedings.

Report of Trial Proceedings

Report of Trial Proceedings on March 27, 1946 before Judge John V. McCormick. Appearances: A. A. Pantelis and Harry A. Iseberg (representing Mr. Barnet Hodes) for plaintiff and Maximilian J. St. George and Albert W. Dilling for defendant.

Twelve jurors were thereupon sworn to try the issues herein.

Mr. Pantelis then made an opening statement on behalf of plaintiff; and Mr. St. George one on behalf of defendant. Then plaintiff introduced the following evidence:

LUCILLE MCVICKER LIPMAN, testified for plaintiff as follows:

My name is Lucille McVicker Lipman. I live at 1946 N. La Salle St. I was born in Grant County, Indiana. The [fol. 4-6] McVicker family came there in a covered wagon; they were the first family to settle in that county. My maiden name is McVicker. I was reared in the Society of Friends, commonly know as Quakers.

That is the religion of my folks and it is my religion now. I am living in Chicago since 1923. I am married, my husband's name is Lipman, an attorney. I had occasion to visit the meeting place at 37 S. Ashland Ave. on February 7, 1946. I arrived about ten minutes before the meeting began, about twenty minutes after eight. I had tickets.

(Tickets marked Plff's Ex. 1 for iden.)

This ticket entitled a person to admission. A friend of mine took me; she had two tickets. These tickets were taken up at the door. I think it was Mrs. Kister who took them up but I don't know. I found a place to sit after a while. The woman that I was with and I walked up the side aisle, and then we went over and sat down in the middle of the audience up towards the front. The hall was quite crowded.

The meeting was called to order ten minutes after we found a place to sit. I thought there were about 400 people.

Plff. Ex. 1 was introduced into evidence as follows:

PLAINTIFF'S EXHIBIT 1

This card will admit bearer and one friend to hear Father Arthur W. Terminiello (The Father Coughlin of the South) West End Woman's Club.

37 S. Ashland Blvd. (cor. Monroe) Chicago, Illinois.
Thursday, February 7, 1946 8 p.m.

Subject: Christians, Awake!

Dealing with the most dangerous and dynamic issue of the hour. The most fearless speech since the war.

Father Terminiello will be introduced by Gerald L. K. Smith. Auspices: Christian Veterans of America, Fred Frick Kister, Director.

Admission by Card Only

(Mr. Pantelis read Plff's Ex. 1 to the jury.) I was in the hall during the time that defendant spoke. He talked for about forty minutes. I don't remember everything he said. One of the first things he said was that there were no words vile or low enough for him to express his contempt for the atheistic, communistic, Zionist Jews who were picketing outside of the building, and there were no words low enough for those skunks of Jews that got in there, I being one of them, an Irishman. He told the people that the Jews were godless, that they had a movement on in this country to destroy the Christian Republic, that we should not say that this country is a democracy, that it is now a democracy run by communist Jews, turned over to them during Roosevelt's administration and it is not a democracy, but a republic; that democracy was nothing but mobocracy, and under a democracy these skunks outside of the building would be allowed to vote, under a republic they would not.

When Terminiello said there was no crime too great for the Jews to commit, the woman next to me said, "Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us." (Here the court threatened to clear the court room.)

He then said that a non-Jewish doctor who was in the U. S. occupation army in Germany told him that they were cutting off the arms and legs of Germans so that they could not have another war, and that Jewish nurses were inoculating German women and children with syphilis, and typhus germs and other disease germs. He did not say a non-Jewish doctor, but non-Christian doctor.

The people around me said, "Oh, that is terrible" and "that is terrible thing" and "Oh" and "Ah." He said that the Jews had such a strong hold on this country that as soon as the war broke out, this government went down to South America and got 30,000 Germans, and turned them over to the Russians, and they were sent to Siberia to be

slaves in concentration camps there and they were still there.

He said other things about this which I can't remember. He said that they went back and took the families and confiscated their money. He said the U. N. O. was a fake and a fraud, that only the warring nations belonged to it, that the only peaceful nations were Spain and Argentina, and because of Jewish influence they were not allowed to be in it; that Franco was a great Christian. I didn't take notes and I don't believe I remember anything else.

When I entered the meeting place no one jostled me or spat on me or pushed me around; I went right through the picket line, I went in with two or three people and saw nobody pushed or spat on.

About the first thing I remember Terminiello saying was what he said about the pickets outside. I have heard him speak since and I have the two talks confused. I cannot remember. In his talk he said this was a Christian country. [fol. 4-9] Either he or Smith said that they were carrying out the Pope's program to christianize America.

He said Mrs. Roosevelt and Wallace were helping the communists in this country. He said the German women 16 to 60 were all raped by Americans and Russians. He told a funny story about a Jewish and an Irish boy; that if you don't want to share everything with the Jews they call you a communist; that there was a Jewish and an Irish boy rooming together or in a hotel together, and the Jewish boy wanted to borrow some shaving soap, and the Irish boy gave it to him; then he wanted to borrow a collar, and the Irish boy gave him that. Finally he wanted to borrow his tooth brush and the Irish boy said No. So the Jew said "You are a communist, you are anti-semitic." Don't make faces at me Terminiello.

Mr. Pantelliss: I don't think she gave us the joke, but it is all right.

During the talk one of the audience said the Jews are all killers, if they were not killed first they would kill the Christians. A woman friend told me after the meeting that the Jews would have to pay for beating Mrs. Smith up in Cleveland when Smith was talking, that it would be a few months before the revolution started and that Smith and his followers were all ready for the fight, and there was 225 organizations in the United States who would go after the Jews. (The Court over objection permitted this to stand.)

Cross-examination of Mrs. Lipman:

I am not Jewish. I am Irish. My ancestors came from Ireland by way of Scotland, and fought in Washington's army.

[fol. 4-10] I was accompanied to the hall that evening by Mrs. Senn, whom I met down town by appointment. She asked me to go to the meeting. She had tickets and I went with her. Some one drove us there.

They left us off about 2 blocks from the hall on Ashland. The building where the meeting was held was on Ashland, near Wieboldt's, on the east side of the street. I didn't see any people congregated in front of the building, but I saw people walking around with signs.

I don't know how many people were walking around. I walked through the picket lines and got in. Do not know how many people were in the picket line. There was quite a few people there. I do not know where the picket line started from nor where it went, nor whether it was a double or a single picket line. Most of the people I saw were white; they were not Jewish; I am sure about that, I ought to know a Jew if anybody does. I didn't see any Jewish veterans there. I saw gentiles. I had no difficulty in walking in; I had to push through to get in. I mean I had to walk through the line. I didn't have a hard time getting through. There were quite a few police there.

I saw three or four police outside the door and 3 or 4 inside the door; I don't remember seeing any on the corner of Ashland and Monroe. It could have been between 8 and 8:30 when I got there.

All the seats but two in the middle of the audience were filled and we sat in them. The hall was full. I was present in the hall from the time I took my seat until the end of the meeting. A policeman opened the door and let us in. A woman who I think was Mrs. Kister, was standing by the stairway. I don't know Mrs. Kister.

[fol. 4-11] There were 3 or 4 policemen in the second entrance, and I think I saw a couple in the body of the hall. I saw one policeman walking to the rear door where there was noise. There was not a lot of noise outside; not any more than usual for picketing, that is I heard no guns or anything like that go off. I didn't see any stones thrown through the window. I don't say it didn't take place; I didn't see it.

I did not see any paving blocks thrown through the window. I heard only once like a pane of glass was breaking. Excepting the clapping of hands I heard no other noise inside the hall throughout the meeting. I heard some disturbance in the back. I did not know what it was. The noise that I heard was somebody being taken out from the audience. I heard only a little commotion when some one was taken out. I would say Smith opened the meeting; he was introduced by Mr. Kister. They opened the meeting by singing two verses of America, then the allegiance to the flag and the Lord's Prayer—I don't know which came first—they did all three. Then Mr. Smith spoke; it seemed like an hour to me. Mr. Kister spoke after Mr. Smith, and then Terminiello.

Kister spoke for a few minutes; the people on the platform were introduced and some said a few words, and one of the directors of the Woman's Club, Mrs. Anderson, said a few words.

Father Terminiello was the last speaker. I don't know what time it was. I don't know what time it was when I left the hall. I talked to a lot of the pickets for about half an hour. I think the meeting was closed with prayer.

The audience were warned not to defend themselves on leaving the hall. I don't believe I remember that. I didn't [fol. 4-12] hear that they were told to just brush it off if they were spat upon.

I remember someone saying that the police said we could not leave for another half an hour. But I didn't wait. I went right out. The others waited. I didn't know any one of the pickets. I didn't talk to Eatimer about the case; I called his wife and told her I would be a witness. I knew the case was on as I read it in the paper, and I heard it other places. Everybody knew about it. Mrs. Serb invited me to go to that meeting.

I think Smith said that Terminiello was carrying out the Pope's program to christianize America. I am not sure; I heard them at other times and I may have their speeches mixed up. As to the raping of German women I am not sure—I think he said Americans and Russians; I may be mistaken about him saying Americans. Nothing that Father Terminiello said caused me to do anything violent or against the law, but I felt like it.

I was very much riled up at all the lies that were told, most of them were lies; and I was so wrought up about it that I called up and offered to be a witness.

IRA LATIMER, testified for plaintiff as follows:

My name is Ira Latimer. I live at 4951 Lake Park Ave. I am executive secretary of the Chicago Civil Liberties Committee, with which I have been associated for ten years. Prior to that I taught social science at Columbia Teachers College in Chicago and Le Moyne College, Memphis.

Plf. Ex. 1 is the ticket used in entering the meeting on Feb. 7th at 37 S. Ashland Ave. Plf. Ex. 2 for identification [fol. 4-13] came to me in the mail at my home. Enclosed were 7 or 8 tickets similar to Ex. 1. Plf. Ex. 2 introduced into evidence and is as follows:

PLAINTIFF'S EXHIBIT 2

Plf. Ex. 2; signed by G. L. K. Smith, urges the reader to attend the meeting Feb. 7, 1946, tells about the speaker, Father Terminiello; ends with "the slogan should be, Christ or Chaos—Christian Nationalism or World Communism—Which?"

Mr. Pantelis then read to the Jury Plf. Ex. 2.

I arrived at the place of meeting about 7:30 P. M. and entered about 8, went straight up the stairs and into the hall. Some one took my ticket, and I found a seat. The meeting was called to order about half an hour later. I recall the opening remarks of defendant after he was introduced.

(Witness identified defendant). This happened in Chicago, Ill. He said "I want to whisper my greetings to you, fellow Christians." And then he repeated that louder into the mike. Then he spoke about the war in Europe. I don't recall what followed immediately after the opening remarks. He was still speaking when I left and he said "You all recall the Morgenthau plan to starve the German people. A friend of mine in Akron, Ohio, told me the other day that a non Christian doctor told him that they were amputating the limbs of all Germans they could get hold of, and that non Christian nurses and doctors were injecting syphillis and other disease germs in the German people," and right after that I left. Before that he cited a Chicago Tribune

article indicating that there was evidence that Department of Justice agents had gone into South American countries and had secured the removal to the United States of a numb[fol. 4-14] ber of German nationals. They were brought to the United States and put in concentration camps, and were then released, and upon their release they were caught, taken in flight for illegal entry and shipped to Siberia as slaves, not just a thousand but the number runs to 10,000. That is all that I recall on that particular statement. He said that these agents or other people had gone to South America and told the families that these people were held, and if they made financial contributions either to their defense, or these people for other purposes, that they could secure their release; but they were not released, but were sent to Siberia. He talked about Queen Eleanor being one of the world's counsels, drawing this, that, and the other salary, and being on pension, and getting paid two or three other places, and that she talked about the war being the first step towards revolution. Secondly, Henry Adolph Wallace, the phrase used by Father Terminiello, was quoted as saying that there was a revolution going on, and that this revolution might be bloody, or more or less bloody. As I recall it, he said "more bloody." I was near the back of the room on the left-hand aisle, and I could not see closely at the microphone level whether or not he had any notes in his hand, but he appeared to have.

Then he quoted a Chief Justice of the United States, which was mixed up—I didn't understand it quite, but it was to the effect that ways could be found to interfere with freedom of speech, and press and religion. I believe he named Chief Justice Stone. He talked about Roosevelt. He quoted F. D. R. as having said that in Germany they would get three bowls of nothing, three times a day; and [fol. 4-15] about industry, there would not be any industry left in Germany; about health, there would not be any protection against infection.

He didn't say anything about Jewish doctors, as far as I can remember. He went on to tell about this injection of disease germs. I think that concluded his talk.

He said, among other things, that the Russian army was raping and murdering the people of Eastern Europe. That is what the bowling mob has in store for you. The comments from the audience when the statement was made

about the non-Christian doctors and nurses, were "Ah" and "Oh" and other expressions of anger.

A man in back of us said that the Jews and niggers and Catholics would have to be gotten rid of. One man was ejected from the aisle, from the hall; that is the aisle from where I was sitting, at the instance of a number of women who pointed to him, and appeared to be in conversation with him, and I don't recall whether Father Terminiello or Reverend Smith was speaking at that time. There were howls, hoots, cries and shouts at various points in the speech, at which he made various points. There were comments made in the hall by the people during the course of his speech when the defendant referred to the mob outside.

They shouted and cried and said, "Tell them, Father", or "That is right", when he called them scum, and slimy scum and skunks, and so forth.

Cross-examination of Mr. Latimer:

[fol. 4-16] The audience cheered and clapped their hands at various moments in Father Terminiello's speech. They did not conduct themselves as an average audience would. They were not calm. They were disturbed and angry.

There was noise from the outside from time to time and I heard the breaking of glass. I saw no stones thrown in. I didn't take special notice of the blinds but they must have been drawn. I didn't see any windows. I heard the audience say, "Tell them, Father".

And I heard the applause. I signed this complaint. I found that the reaction of the audience tended to a diversion of the peace by Father Terminiello; there was not mere applause and mere cheers.

I was professor at LeMoyne College. It is not true that my activities were and are communistic. (The Court sustained the objection of counsel to the question whether the witness was dismissed from LeMoyne College for public activities. Mr. Dilling stated that he is ready to prove that the witness' activities were on behalf of Communism and that he should be permitted to impeach the witness.)

The Civil Liberties Committee is a voluntary association not for profit, incorporated under the laws of Illinois, to defend the Bill of Rights and civil liberties.

It is not communistic. I publish the Civil Liberties News. I went to this meeting on February 7th at the instance and

request of the board of directors of the Chicago Civil Liberties League, who are thirty citizens of Chicago and [fol. 4-17] are Landon L. Chapman, Samuel P. Gurman, Robert R. Travis, H. B. Hitman, Rev. Joseph G. Moore, Mrs. Blanche Lowenthal, A. G. Tapper, Phillip Wayne, Pearl Hart, George E. Fairchild, John Bernard, Carl Grabo, Peter J. Hogan, Sidney Weisberg, Frederick Mashall Davis, Fred Patashnu, Clarence Avildsen, Richard W. Smith, Pope Huff, Mrs. Helen Slive, Irwin R. Wier, Wesley E. Sherer, David I. Lipman, Dr. Mets Lachard, Esther Brody. David I. Lipman is the husband of Mrs. Lipman, the witness. He is an attorney and Jewish. Def. Ex. 1 for identification is the Civil Liberties News, 71, issued by the Civil Liberties Committee under my direction. I was not at the meeting at 160 North Wells Street on February 7 at 6:30 o'clock and I didn't know of such a meeting. I went to Father Terminiello's meeting alone, got there about 7:30 and entered at 8:00. I stood for this half hour on the sidelines and watched the picket line grow. About 8:00 o'clock I suppose there were 250 people.

The picket line was a single file and they doubled back on their tracks in front of the building so that it was actually a double line with a space on the sidewalk between the pickets. There were small groups of people in various places. I went through the picket line.

Police opened the picket line and I went through. I noticed this happening more than once. During the half hour I was there it was possible to get through the picket line without pushing apart some parts of it. There were about four or five policemen in front of the building, and additional police arrived. About fifty or sixty of them were scattered all over in the back, on the side and in front and [fol. 4-18] across the street at the Y. W. C. A., and the north side of the building. I had no difficulty in passing the receptionist but the fellow behind me did. The notice of the meeting with several tickets was mailed to me under my name or J. H. Latimer to my old address of a year ago. I gave out those tickets that I received and one of the persons attended with me. I knew of someone having a court reporter there.

I knew where the stenographer sat because Mr. Smith referred to her sitting down in front. Mr. Smith knew she was there, and when Mr. Smith made the statement Father

Terminiello was on the platform and I believe he heard it. I do not know if the story about the Germans in South America appeared in the Chicago Tribune. I never heard of George Dix of New York who is handling these cases. Before I heard Father Terminiello tell about the German internees brought from South America I did not know anything about it.

I did not know that Eleanor Roosevelt was getting a pension as well as a salary for being a delegate to the U. N. O. I did not read her statement in the press nor hear that we are still in the revolution nor about Henry A. Wallace who said we were in the revolution and he hoped it would not be a bloody revolution. He is not a friend of the Chicago Civil Liberties Committee. Mrs. Roosevelt has spoken twice for us. We engaged her through a lecture bureau.

Father Terminiello said that Chief Justice Stone had said there was a way of by-passing or avoiding the constitutional guarantees of free speech, press and religion; I do not know what it means. I believe in free speech. I believe [fol. 419] in free speech for Father Terminiello. I never said that Father Terminiello, Kister and Smith should not be allowed to have free speech.

Before I heard Father Terminiello I did not read in the papers what F. D. R. said about giving the Germans three bowls of soup every day, doing away with their industry and destroying their health. I read in the newspapers that Russian, British and American cases of rape had been reported, this roused me and the people in the audience, and I swore out a warrant for people who tell lies. I am not a lawyer, never studied law. Besides myself attending this meeting there was another director of the Chicago Civil Liberties League, Wesley Sherer. Homer Jacques, a director and secretary of the American Civil Liberties Union, Chicago Division, was there also. He does not agree with me about this case.

I suppose it was 9:30 or a quarter to ten when I left the meeting. Father Terminiello was still speaking; he had been speaking about a half hour before I left. I noticed the crowd outside when I left. There were around 300. The pickets were still marching up and down and were more bunched near the front entrance. They were still moving. I do not know how deep or how many there were.

I read the papers about this meeting. I am not reported correctly in one of the papers as saying "I want to get this priest", or "that priest".

The Court warned the jury not to discuss the case with anyone and adjourned until March 28, 1946, at 9:30 A.M.

The Court asked the jury if they had read an article with [fol. 4-20] reference to this case in yesterday's "Times". The jurors answered "No".

MABEL HALL testified for plaintiff as follows:

My name is Mabel Hall. I live at 6548 Woodlawn. I am a court reporter for 17 years. I have reported cases, conventions and meetings during that time.

E. J. Walton Reporting Office asked me to cover the meeting on February 7, 1946, at 37 South Ashland Avenue, Chicago. I arrived at 7:10 and went to the front of the hall and met Father Terminiello and Mr. Kister.

I asked Mr. Kister who I should see, that I had come to report the meeting and he referred me to Mr. Smith. I went to the front and called out "Mr. Smith". Mr. Smith turned my way and I told him that I was there to report the meeting and asked him for a comfortable place to work. He told me to go on the stage and wait there and he would take care of me. I went there and had a table and chair on the stage. The meeting was called approximately a half hour later and I sat there as long as there were any proceedings.

I went to the rear of the hall just prior to the second collection. I did not remain on the stage all the time during the speeches as either Mr. Smith or Mr. Kister asked me to move the table, and they moved the table in front just below where it had been on the floor level within six feet of the speaker's and I think Mr. Kister made a few remarks in testing the loud speaker. Without referring to my notes I couldn't say whether Mr. Kister or Mr. Smith opened the meeting.

I was present during the speech of Rev. Terminiello. I took notes and have my shorthand notes and I transcribed [fol. 4-21] those notes. (Said notes marked Plf. Ex. 3 for identification.) Except for the first seven lines and part of the last page, this is the transcription of the defendant's speech, and it is a true and correct transcription from my shorthand notes of said speech.

It begins at 115 and ends on page 129 in my notes. (Plf. Ex. 4 is shorthand notebook of witness.)

Plf. Ex. 3 was admitted into evidence and is as follows:

PLAINTIFF'S EXHIBIT 3

Let every person in this house tonight stand and give this priest the greatest hand he has ever received, the Reverend Father Arthur W. Terminiello, Birmingham, Alabama. All that are glad to have him here say Aye.

. . . . . .

Father Terminiello: Now, I am going to whisper my greetings to you, Fellow Christians. I will interpret it. I said, "Fellow Christians," and I suppose there are some of the scum got in by mistake, so I want to tell a story about the scum:

You know one time a man was arrested, brought in court for trial. As he stood trial, he had some trouble in court. The Judge said, "I will fine you $10.00 for contempt of court." The man went up and laid $20.00 on the bench. The Judge said, "The fine is only $10.00." He said, "My, Judge, your Honor, $10.00 doesn't begin to express the contempt I have for this court."

Now, my friends, nothing you hear tonight so far, nothing that I would say can begin to express the contempt I have [fol. 4-22] for that howling mob on the outside. Nothing I can say can express the contempt I have for anyone who would dare to attempt to undermine the freedom of speech and all the other freedoms of America. And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake.

We face this attempt to intimidate, and we have determined all of us here and all of you there—we on the stage are decided that if we show a weak spot, it would be too bad; and so now, no matter what might happen tonight, probably nothing will—I say, they have another trick, they have thousands of tricks—one they attempted tonight while Mr. Smith was speaking was to send in firemen with tin hats to try to stampede this meeting.

So, no matter what noises you hear, sit still. Don't anybody move. Now, on the stage, it is my privilege to be with a great man and a great American, but we have all these others. I won't take time to go into all of them, but I have

had weeks now to spend and take time with one of the greatest of Americans in this country today. He has been put by the howling mob with the character of the lunatic fringe. You remember my Savior was put on the lunatic fringe when he was brought before Herod and kept in the role of a fool. It is my great privilege to be on that great lunatic fringe tonight with Gerald L. K. Smith. Also, on the stage tonight is the beautiful and courageous and faithful wife. The only thing I can say, that the history books of America will write these two names down side by side as two persons who did more than any other Americans to preserve all these things that we hold so dear in this country. [Fol. 4-23] Now, my friends, I am not going to take much time in introducing the subject I want to talk to you about. The subject I want to talk to you tonight about is the attempt that is going on right outside this hall tonight, the attempt that is going on to destroy America by revolution. We have been going on, ten years ago, when I began to preach about this menace of America, I was told by our own people, "It can't happen here. Shut up; it can't happen here. Why talk about those things." And so we thought it was foolish when we tried to discuss, when we knew the philosophy back of it, a philosophy back of destruction, a philosophy of [unsolveinent]* enslavement; and we knew what was going to happen.

My friends, it is no longer true that it can't happen here. It is happening here, and it only depends upon you, good people, who are here tonight, depends upon all of us together, as Mr. Smith said. The tide is changing, and if you and I turn and run from that tide, we will all be drowned in this tidal wave of Communism which is going over the world.

I will tell you another story, along this line. There was one time a girl and boy that were much in love. The boy protested that he would do anything for her, he would face death for her. Just about that time a bull started after them. They both ran for the fence. The boy got over first. The girl just about made it. When she got over she said, "I thought you said you would face death for me. The first chance you got you ran away and left me." He said, "That bull is not dead." The bull we face tonight is not dead. It

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is not a dead bull that is howling outside. Nobody is going to go through that bull.

[fol. 4-24] As Mr. Smith said, you have the best police force here in the world. We have confidence in them. It is up to you to act that way. I am not going to talk to you about the menace of Communism, which is already accomplished, in [motion]* Russia, where from eight to fifteen million people were murdered in cold blood by their own countrymen; and millions more through Eastern Europe at the close of the war are being murdered by these murderous Russians, hurt, being raped and sent into slavery. That is what they want for you, that howling mob outside.

I know I was told one time that my winter quarters were ready for me in Siberia. I was told that. Now, I am talking about the fifty-seven varieties that we have in America, and we have fifty-seven varieties of pinks and reds and pastel shades in this country; and all of it can be traced back to the twelve years we spent under the New Deal, because that was the build-up for what is going on in the world today.

This New Deal of which I am speaking, was the illegitimate child of a misdeal and a double deal on the American people. When we try to tell you that priests and our ministers throughout the country, when we attempted to tell you, you said we were talking politics; so many of our people said "Talking politics." Now you see what it has brought to you. All of it can be traced into the great Red menace by the New Deal in Washington.

Now, my friends, this revolution that is coming to America, this revolution was promised by Russia. They may talk about the great democracy they have there. May I say [fol. 4-25] here, don't ever use that word "Democracy" again. This country is a republic, and, please God, we are going to keep it a constitutional Republic, because when we degenerate to the so-called Red democracy, we are degenerating to the level of the howling mob on the outside. We don't have government there; we have mob-ocracy. That is what we don't want for America.

Now, Russia promised us we would go back to the official newspaper of Russia. Primarily, it was back about 1929. They quoted the words of George E. Dimitroff, who at that

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time was the Executive Secretary of the Communist International. I only quote you this one passage. I could quote thousands of paragraphs for you. Let me quote you: "The worldwide nature of our program is not mere talk, but an all embracing blood-soaked reality." That is what they want for us; a blood soaked reality but it was promised to us by the crystal gazers in Washington; and you know what I mean by the "crystal gazers", I presume.

First of all, we had Queen Eleanor. Mr. Spaulding said, "Queen Eleanor is now one of the world's [counsels.]" communists. She is one who said this—imagine, coming from the spouse of the former President of the United States for twelve long years—this is what she said: "The war is but a step in the revolution. The war is but one step in the revolution, and we know who started the war."

Then we have Henry Adolph Wallace, the sixty million job magician. You know we only need fifty-four million jobs in America and everybody would be working. He wants sixty million jobs, because some of the bureaucrats [fol. 4-26] want two jobs apiece. Here he is, what he says about revolution: "We are in for a profound revolution. Those of us who realize the inevitableness of the revolution, and are anxious that it be [wholly]* gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody."

And then Chief Justice Stone had this to say: "A way has been found for the effective suppression of speeches and [principles]*, press and religion, despite constitutional guarantee,"—from the Chief Justice, from the [former]* Chief Justice of the United States.

Now, my friends, they are planning another russe; and if it ever happens to this country, God help America. They are going to try to put into Mr. Edgar Hoover's position a man by the name of George Swarzwald. I think even those who were indicted on so-called sedition charges, that the majority of the individuals in this department, that Christ like men and women who realize today what is going on in this country, men who are in this audience today, who want to know the names of those people, before they are outside, they want to know the names if any. Did you hear any tonight that you recognize? Most of them probably are.

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imported. They are imported from Russia, certainly. If you know the names, please send them to me immediately. Send them to my office in Birmingham. They want to know who they are and who is leading them.

Now, I say to you, write to your Congressman, write to your Senators, and tell them you don't want to undermine the Federal Bureau of Investigation. Now, my friends, we [fol. 4-27] have been told that this new revolution is to induce a democracy, remember this that a democracy which we don't have in America. We don't want in America nothing but the substitution of the terror of the mob for the tyranny of a dictator, and that is what we don't want here in America.

Now, all of this that is going on, all of this noise that you hear around, is part of a great plan to enrich a few at the expense of the many. When Communism comes to America, when it has come to the world, everyone becomes slaves. Millions upon millions of Poles have ruthlessly been transported to Siberia, where the greatest industrial region of the world today is, and this region has been built over the years by the blood of slaves from other parts of the world. Slaves from South America—now, a few months ago there was put into my hands some evidence, and I read that, and I was shocked and I said, "Oh, that can't happen in America!" That women would participate in selling slaves today. And here is what is going on: Your Chicago Tribune on January 24th carried an article, in which it told a story of the refusal of [a radio head to direct Carroll] the court to grant a writ of [George of the Democratic Republican.] habeas corpus to Doctor Carl George of the Dominican Republic. Then we gathered together the pieces. Now, we know those facts I had are true. They have not come out completely yet. Watch your paper for South America, and you will see it is true.

Briefly, here is what happened. Officials from Washington went to South America. They first bribed South American officials. They then gathered all of those of [fol. 4-28] German extraction, they labeled them through the members, Nazi; they took them to concentration camps in this country before the war. Revenue Department of Justice, and there were other approaches, which took part in this, so with big business of South America—all these

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men were business men with money. Then they went to South America and they got the families. They said, "Now, nothing will happen to your husband or your father, whatever the case might be, if you keep your mouth shut." Then they said, "Now, give us the rest of the money you have and we will take care of the defense of these men." Then they came back here just about the beginning of the war and they employed what is known in history as the [refuge] lex fuga—the law of flight that opened the concentration camps. They said, "All right, boys, run for it." As they run, they were arrested for illegal entry in the United States. They were then put on the cross lines and sent to Siberia as slaves where they are today. This is not only a dozen, or a baker's dozen. The minimum number is ten thousand, and they go as high as a hundred thousand. That is what has been going on by this bureaucratic New Dealers in Washington.

Now, this is an attempt to fertilize the soil of Europe with the blood of people, whether they are guilty or innocent. They have no hope other than to be slaves, and we know who is back of it. Didn't you ever read the Morgenthau plan for the starvation of little babies and pregnant women in Germany? Whatever could a child that is born have to do with Hitler or anyone else at the beginning of the war? [fol. 4-29] Why should every child in Germany today not live to be more than two or three months of age? Because Morgenthau wants it that way, and so did F. D. R. Let me quote you what F. D. R. said one time: "Feed the Germans? I will give [free]* three bowls of soup a day with nothing, nothing. Control [infection]* inflation? Let them have all the [infection]* inflation they want. Control industry? There is not going to be any idustry to control." You will know who is behind it when I tell you the story of a doctor in Akron, Ohio. He boasted to a friend of mine within the last few days, while he was in the service of this country as a doctor, he and others of his kind made it a practice—now, this was not only one man, made it a practice to amputate the limbs of every German they came in contact with whenever they could get away with it; so, that they could never carry a gun. Imagine men of that caliber, sworn to [win]* serve this beautiful country of ours, why should we tolerate them?

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My friends, this [money]* moment someone reminded me of the plan to sterilize them. The nurses, they tell me are going to inject diseases in them, syphilis and other diseases in every one that came there all of one race, all non-Christians.

Now, my friends, remember F. D. R. told us one time—how well I remember that—"Things don't just happen that way. They are planned." He told us that just before Pearl Harbor, and we know that Churchill—I don't intend [fol. 4-30] to go into that subject tonight, but I want to tell you here, it should be interesting for you to go back in memory to those days, so that never again might it happen to this country.

I remember talking to some of our friends in the Nationalist movement even at that time. I said it will never happen in America that we will go to war again. Eighty-one per cent of the people in this country don't want war, and he said, "Oh, you innocent little cherub, when the time comes, there is going to be an incident. Immediately after the incident, the air waves are going to be filled with ——, patriotic songs, on to final victory, and all those things, and all of our organizations will feel, there will be no resistance.

I was driving through Atlanta, Ga. on the day Pearl Harbor was attacked. I was listening to that news; I am not very emotional. It has been said I don't have a heart. I know that is one time I cried. I said, "This is the incident," and I made a resolution to myself that day, I said, "If I live to be a hundred years old, no matter what I have to go through, I am going to expose Pearl Harbor, so that never again will it happen."

It is being exposed. I will tell you more about it Saturday, what you don't know about it already. Let me tell you a story here, while we relax for a moment in line with this. The story is told of a plane which was going to the West Coast. As they approached the Rockies, the weather was bad. The pilot was in the plane. There was also a German, an Italian, an Englishman and a Greek. The pilot said, "Someone is going to have to make the supreme sacrifice [fol. 4-31] and jump out." The German said, "Heil Hitler," and he jumped out. I should not have put my hand up, with these photographers here. The pilot said, "One more person is going to have to make the supreme sacrifice."

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The Italian then said "Viva Mussolini" and he jumped out. Then the pilot said one more must make the supreme sacrifice. With that, the Englishman pushed the Greek out and said, "There will always be an England."

Yes, there will always be an England, my friends, because the [blood]* soil of the British Empire is watered by the best blood in the world, Irish blood and American blood. Now, we come to the postwar period, and we are told by these same pink bureaucrats that everything now must turn to reconversion. Reconversion has become the new dogma, and they have tried to impress upon all of us that if we oppose reconversion, we are traitors. Gentlemen, if we opposed the war, we were traitors; if we opposed peace, we are traitors; if we oppose reconversion, we are traitors. Let me tell you, to summarize that reconversion is not a war job but a peace job; that reconversion is not a government job but a job of private enterprise. That reconversion is not an army job, but a civilian job, and now we have come, we have gathered together what we call the peace loving nations of the world and the only ones that are not in this peace are the nations that have been at peace. The only ones eligible for membership are warring nations.

[fol. 4-32] Now, we are going to get the [throats,]* threats of the people of Argentine, the people of Spain. We have now declared, according to our officials, to have declared Franco to have taken the place of Hitler. Franco was the savior of what was left of Europe.

Now, let me say, I am going to talk about—I almost said, about the Jews. Of course, I would not want to say that. However, I am going to talk about some Jews. I hope that—I am a Christian minister. We must take a Christian attitude. I don't want you to go from this hall with hatred in your heart for any person, for no person. I say to you, we must have the Christian attitude. What is the Christian attitude? We must look upon every human being at least potentially [rather]* as a member of the [mythical]* mystical body of Christ. While, as our members in Christ, it means we must love every person, Germans and Jews, Italians and everybody. We must love them, but I say to you, that doesn't mean we must love the errors of these people. We must not love particularly the criminals among those people. We say that Hitler was a criminal. Let's

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presume that was so. I didn't say it is not so. Let's say he was. It doesn't mean we must condemn the whole German race.

So it is with the Jews, we must condemn the criminals, even if they are Jews. We must condemn Communists wherever we find them, if they are Irish, German, Norwegian or Jews, they must be condemned. But the moment we point to a man and say that man is a Communist, or that his name happens to be Ginsberg, then, we are considered to be anti Semitic.

The story is told of two friends who went to a hotel. One [fol. 4-33] of them forget to bring his traveling equipment. This boy who forgot was a Jew. He said to the Irish boy, "May I borrow your soap?" Pat said, "Yes." Then the other boy said, "May I borrow your gum?" Pat said, "Yes, certainly." Then the Jewish boy said, "May I borrow your razor?" Pat said, "Yes, certainly." Then the Jewish boy said, "May I borrow your shaving brush?" Pat said, "Why sure." And then the Jewish boy said, "May I take your tooth brush?" At which time Pat said, "The tooth brush, that is going too far into the Semitic."

Now, this danger which we face—let us call them Zionist Jews if you will, let's call them atheistic, communistic Jewish or Zionist Jews, then let us not fear to condemn them. You remember the Apostles when they went into the upper room after the death of the Master, they went in there, after locking the doors; they closed the windows. (At this time there was a very loud noise as if something was being thrown into the building.

Don't be disturbed. That happened, by the way, while Mr. Gerald Smith was saying "Our Father who art in heaven;" (just then a rock went through the window) Do you wonder they were persecuted in other countries in the world?

And when we were in Cleveland, I hadn't run into this; I was not an old campaigner, like Mr. Smith. I haven't had the courage that he has day after day, and month after month, and year after year, to go out and face that same howling mob; and when I saw it for the first time in Cleveland, was where I saw it first, I thank God that I did *dit*, because it brought home to me the realization of the danger you face.

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[fol. 4-34] Now, to me, it doesn't make any difference. I always said that when I was cautioned to be wise and prudent, if you will, I always said, "Why should I be?. I am a son. I have no children, no family. If anything happens to me, there is no loss except to me." You in the audience are men with families, women with children, and there are women and children in the audience. I say that I didn't get that — an example.

How can we expect to save America and say that when I face that audience — that big line in Cleveland, I heard that pagan chant that you hear out there.

You know I have always made a study of the psychology, sociology of mob reaction. It is exemplified out there. Remember there has to be a leader to that mob. He is not out there. He is probably across the street, looking out the window. There must be certain things; money, other things, in order to have successful mob action; there must be rhythm. There must be some to beat a [cane]* cadence. Those mobs are chanting; that is the caveman's chant. They were trained to do it. They were trained this afternoon. They are being led; there will be violence.

That is why I say to you, men, don't you do it. Walk out of here dignified. The police will protect you. Put the women on the inside, where there will be no hurt to them. Just walk; don't stop and argue. Just like they wanted that incident on the railroad. That was instituted by the Communistic party in order to have murder. Now, my friends, another thing, they have [hoisted]* foisted on the American people. They told us everybody must be big brothers. That means, we must all act to protect them. They are big [fol. 4-35] brothers; they don't want to be our big brothers; they want us to be tolerant to them, but they don't want to give us tolerance. They want to picket our meetings. They don't want us to picket their meetings. It is the same kind of tolerance, if we said there was a bedbug in bed, "We don't care for you," or if we looked under the bed and found a snake and said, "I am going to be tolerant and leave the snake there." We will not be tolerant of that mob out there. We are not going to be tolerant any longer.

We are [not]* strong enough. We are not going to be tolerant of their sneaks any longer. We are going to stand

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up and dare them to smear us. We are not going to be tolerant any longer of their pagan eye-for-an-eye philosophy. [league.]*

We are going to say [Veteran]* We are Christians, and proud of it, we are not to be tolerant of their blasphemy. We are not going to be tolerant of their communism, of their efforts to destroy the American Youth through the Frank Sinatras and others who are going about advancing communistic ideas. We are not going to be tolerant of their intolerance.

It is time you Christian men and women decided that you have the unity which comes to you from truth, the unity which comes to you from union with Christ and union with one another. That unless you stand together today, not only America but your Christian heritage will be lost to you, be lost to your children, be lost to civilization. Now, we are told by those Communists finally, the last plot is that we must drive a wedge between Christian denominations, and that is why I am here tonight.

[fol. 4-36] We all have our own place. We must adhere to those places, be they Lutheran, Episcopalian, Catholic. If we are in good faith, we must observe those things, but we must get together against the common enemy of all Christians; and they want to drive a wedge between us.

I want to take an extra few moments here to show you how these people work from a man who is supposed to be a friend of ours, told me he is going to help us. Of course, we need money. He promised me for our cause $10,000.00. Of course, I didn't believe it, but I went to investigate. We didn't get the $10,000.00. After I went to see him several times, he left a check for $100.00 with the stipulation on it that no part of this is to go to Gerald L. K. Smith, so, today I wrote him a letter, sent the check back. I told him that I valued the services and the friendship of Gerald L. K. Smith more than even his $10,000.00. Because I know that you people are going to see that we carry on the fight for you.

So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We

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must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from. We are going to stand one and all together and form a solid [vigilance]* phalanx of courage and loyalty and strength and oppose [fol. 4-37] every attempt to [a]* breach [of]* freedom of speech in America, every attempt to dilute Christianity in America, every attempt to [intimidate]* undermine the morality of America every attempt to shed American blood to [permit]* promote Zionism in America, every attempt to [demobilize]* demoralize our America, every attempt to persecute our cross, every attempt to destroy the sovereignty of America by union with other countries of the world, giving up our own sovereignty.

Remember this, my friends, that the Holy Father called upon all of us Catholics, Protestants alike, to form a crusade, and I have done that, I tried to do it. In this crusade we have only three [members,]* principles no organization. You just say you stand for these things. See if you don't stand for them. If you do, let me know. The three principles: God, first, that is the first principle; the second principle, America next; the third principle, all other nations last.

Now before I close, they have accused us of being Fascists or Nazis. Let me ask you a question: How many here—answer by saying Aye—how many in this room are Nazis? —Nobody. How many in this room are Fascists?—Nobody. How many in this room are Communists?—Nobody. I hope the newspaper men get that straight. There are no Nazis, no Fascists, no Communists in this room. How many in this room stand for America First? Let's go out to [find]* found in this nation a Christian new order for America.

. . . . . .

[fol. 4-38] Mr. Smith: I would like to ask that Miss Purcell would please go back to the front of the building and contact the police officer in charge of the detail. We are going to adjourn this meeting if and when Miss Purcell comes back and reports to me that the one in charge of the detail believes it is safe for us to go out on the street. I am sure it

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is. Sit still. We are not going to have anybody move. If there are any chiselers that want to go, we are going to take up an offering for Father Terminiello.

(There was further discussion to stimulate this offering which was not reported.)

Cross Examination of Miss Hall as to Correctness of Certain Words

(Certain corrections were made and appear in Plf. Ex. 3 as corrections). When I got into the hall I think Mr. Kister asked me who sent me there and I told him it was the E. J. Walton Company. He asked me who asked me to come there and I said I did not know. I have no knowledge as to my actual employer. (On the motions of counsel this last answer was stricken by the court.)

I customarily work for Walton Reporting Agency.

MICHAEL KAREL, testified for the plaintiff as follows:

My name is Michael Karel. I live at 21 North Pine Avenue, Chicago. I am 38 years of age, married and have two children of school age. I am in the printing business in which I have been engaged about 15 years. Prior to that I was a druggist. I am a part owner of the Geis Printing Company, located at 108 North Jefferson Street. [fol. 4-39] I attended the meeting on February 7, 1946, at 37 South Ashland Avenue. I arrived at about ten minutes to 8:00. I entered by ticket which was taken up. I found a seat in the hall. The meeting was called about 15 minutes later. There were present about 450 people.

(The witness identified the defendant.) He started to talk by saying "Nothing can express the contempt I feel for that scum outside, and nothing can express the contempt I feel for some of the scum inside this hall". The next item I remember is when he said that the Zionistic Jews are threatening to undermine our country and should all be sent back to Russia where they came form. Immediately after do you want the audience's reaction?

(Over objection of counsel, the court permitted the witness to answer what the audience said.)

Right around me everybody started to holler "Yes, send the Jews back to Russia. Kill the Jews." "Kill the Jews." "Dirty kikes."

Terminiello remarked that he had met a non-Christian doctor and that they were amputating the limbs of all German prisoners, and non-Christian nurses were injecting syphilitic germs into prisoners to make sure they would never be healthy again. (Counsel objected to comments and statements made by the audience. The Court ruled that he might answer.)

Right next to me several women hollered "They ought to do that to the Jews, they ought to cripple them." Terminiello said that it was Morgenthau's plan to starve the German people, that the children were starving and dying at three months of age, and that mothers of 65 lbs. in weight carrying children were very common. I was there during [fol. 4-40] the entire evening. The audience said "They ought to starve the Jews." "They ought to kill Morgenthau", "They ought to do the same thing to him that he is doing to the Germans". There was an incident in which Terminiello classified ex-president Roosevelt and Mrs. Roosevelt as Communists, and that the U. N. O. is a failure. During the time the defendant was speaking they passed out several pamphlets. Plf. Ex. 5 for identification is a copy I received on the occasion of this meeting. That is about all I can remember.

One other thing he said was that when he was driving his car he heard over the radio about the Pearl Harbor disaster, of the sneak Jap attack on Pearl Harbor, and right then and there he made up his mind that he would not rest in peace until he found out who was behind this attack and exposed them, and that he would devote his entire life to that. That is about all I can remember.

Cross-examination by Mr. Karel:

I got in by ticket from an acquaintance. I had no difficulty at all in getting in; I went right through.

I came there alone and arrived about 8:10. I saw people, the police and the picket line.

I know Ira Latimer, I just met him. I had no trouble in getting into the hall and took a seat on the right wing about three quarters of the way back on the south side of the building. The people around me were mostly Christians. I am Jewish.

No one attacked me. No one laid hands on me.

No one molested me. But when Father Terminiello said something about Zionistic Jews the people around me yelled that they should send them back to Russia and kill them. [fol. 4-41] This created a stir which lasted for a few minutes. When mention was made of the non-Christian doctors the people around me said: "We should give it to the Jews." "We should cripple them."

This also created a commotion. No one molested me or laid hands on me. I did not see anyone get up and attempt to go outside or attack anyone; the people kept their seats and heard the rest of the talk. They stood up from time to time making violent reactions. They cheered.

They clapped their hands and they responded to the speech. I heard Father Terminiello say about mothers in Germany weighing 65 lbs., about children dying after three months of age and that the U. N. O. was a failure. I am sure he talked about the U. N. O. for a few minutes. I suppose that would appear in the record. I do not know what the record is.

They did not pass literature around while the speaker was speaking but before the meeting started. It was given at the door on entrance into the hall. There was no literature distributed during the time the speakers were speaking. I heard Father Terminiello say he was going to devote his life to clearing up the Pearl Harbor incident. That aroused me.

(Court did not permit counsel to ask the question whether the witness was against investigating the Pearl Harbor incident). I did not get up and say "You are a God damned liar." I heard someone get up and make that statement.

I heard no noise from the outside at all. I think I heard the tinkling of breaking glass once. I saw no stones or bricks or cobble stones thrown through the windows. On [fol. 4-42] entering the hall I did not hear anybody threaten the speakers. Nobody threatened anybody.

I didn't notice that any of the signs carried by the picketers had on them "Kill Smith." The meeting began by Kister taking the microphone and saying he was testing. Then Smith came on. I don't remember the pledge to the flag or the singing of "My Country 'Tis of Thee." I heard the "Our Father" or the Lord's Prayer recited, I am not sure whether this was before or after the meeting.

I left the hall about 10:30 that evening. I do not remember Smith announcing that the police said the audience

should remain seated for another 20 or 30 minutes because the mob outside was dangerous. When I left, there were a lot of people coming out of the hall who were spectators who were there.

I saw a few policemen when I came in. I did not have to break my way through the picket line. I just passed right through without any difficulty.

No one tried to stop me. No one called "Fascist" or "Nazi," nor did I hear people use the word "Fascist" or "Nazi" while I was going into the hall.

Redirect examination of Mr. Karel:

On every occasion when the people stood up while Terminiello was speaking they applauded and they made violent shouts, as "Dirty kike, kill the Jew, send them back to Russia." Thereupon counsel read to the jury the transcript of shorthand notes of Mabel Hall, Plf. Ex. 3.

Proceedings Before Judge McCormick, March 28, at 2:00 P. M.

[fol. 4-43] Contempt proceedings were had at 2:00 o'clock in chambers out of the presence and hearing of the jury.

Counsel commenced reading from page 48 of Plf. Ex. 3.

Case continued to the next day at 9:30 and the jury were warned not to discuss the case and that they should not read newspaper accounts of this case.

Court convened March 29, 1946, at 9:30 A. M. Proceedings had out of the presence and hearing of the jury.

DEFENDANT'S MOTION FOR MISTRIAL

Mr. St. George: I make a motion for a mistrial on the grounds of prejudice. I do not think it is possible for the defendant to have a fair trial in this case. In the first place the papers have said certain things that are really vicious and untrue. One of them this morning said that the defendant said: "Kill the Jews," etc., and that is absolutely an untruth.

And the item about myself is untrue, and the general atmosphere of the whole proceeding. I asked the court not to have these contempt hearings while this proceeding was pending because of the connection between the defendant and Gerald L. K. Smith shown before the jury, particularly

after the reading of Father Terminiello's speech, that would prejudice the jury.

The Court: I will overrule the motion.

Mr. St. George: Exception.

The Court (in considering an article in one of the newspapers) said: It says, "Mr. St. George was removed." It should have been "reproved." I will caution the jury this morning about what they read in the papers.

[fol. 4-44] The following proceedings were thereupon had in the presence and hearing of the jury:

The Court: Last night I asked you not to read the papers. If you did inadvertently read anything in the papers I want you to understand that that is not evidence in the case and should have no influence on you one way or the other. Matters have appeared in the papers which are not true regarding what occurred. What appeared in the papers is not to affect you in any way. The only way you can decide the case is upon the evidence and instructions of the court as to the law governing this case, and nothing else.

Mr. Pantelis: The City will therefore rest.

And thereupon, the plaintiff rested its case.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. St. George: At the end of all the testimony for the plaintiff in the case, the defendant moves to exclude all the testimony and moves for a directed verdict, that the jury find the defendant not guilty. The basis is the first amendment to the United States Constitution; Father Terminiello had a right to say what he said and what he said was protected by the first amendment to the Constitution, that the charge in this case, namely, a diversion tending to a breach of the peace, if it is constitutional under the first amendment, could not prohibit free speech or tend to prohibit free speech; otherwise it would be unconstitutional.

The Court: Motion for directed verdict overruled.

And thereupon defendant introduced the following evidence.

[fol. 4-45] MARYBELLE MC MANAMAN testified as follows:

My name is Marybelle McManaman. I live at 700 Center Street, Waukegan. I am a housewife. My husband's name is Frank. He is a dealer in paints and brushes. I was at the February 7, 1946, meeting. I went with my daughter

and another lady. We drove in a car. We parked back of Wieboldt's store on Ashland Avenue at twenty minutes to eight and walked to the corner of Wieboldt's store and went across the street. Wieboldt's store is on the southwest corner of Ashland and Monroe. The hall is on the northeast corner.

We got to the northeast corner but we did not get up on the sidewalk, as there was a crowd of people pushing and milling and trying to tear our clothes off. There were about two thousand people, or over.

The people were marching and carrying signs, signs of different kinds, some being about Fascists and some were about Hitler and I do not remember all the names that were on those different signs but there were several different kinds. I was with my two companions at the time, we could not get on the sidewalk because they would not allow us to. They wanted us to join the picket line and not to go in.

They called us various names. They called us Fascists, old hens, they said my daughter was too good-looking to go in with a bunch of old hens, there was nothing but a bunch of radicals in there and we would get beat up if we went in there. They tore my daughter's coat off her, and tore the fur coat. We did not get in. A policeman came over and told us we had better leave because we could not [fol. 4-46] get in. Finally we entered by calling Mrs. Kister and she sent a police escort of about six policemen to get us and they pushed the pickets aside to let us through. The pickets were moving like a snake dance or something so that you could not get through them. You could not walk through the line if you did not have protection by the police. Finally, we got into the hall. We had an invitation like exhibit one. We went to hear Father Terminiello. When we got into the hall Mr. Smith was speaking. This was about twenty-two minutes after 8:00. The hall was filled. We sat on a big couch in the south east corner of the room. I heard the complete speech of Father Terminiello. Before Father Terminiello spoke I heard the people outside, and I heard loud noises, yelling and hollering.

There were four or five bricks or pieces of bricks came through the window of the room. A milk bottle came through the east or the south window of the room. When the bottle came through the window it tore the shade down and the policeman went over and put the shade up. Then everybody moved away from the window. Before the milk

bottle went through the window it had panes of glass in it. I saw a bottle come through the window and after it came through the window was broken. I saw bricks which came through the west windows land on the table and then there were not any windows in there. They were all broken.

I heard names being called from the outside because I sat real close to the window. I couldn't see who was outside but I could hear them. They were calling "Fascists," "Hitlers," and other names, they were using cuss words, "damned Fascists." This kept up all the time Mr. Smith [fol. 4-47] was talking, about a half hour. Then Smith introduced Father Terminiello. Up to that time there was no disturbance in the hall except when a man got up and called Smith a liar. He asked for the platform and a couple of policemen escorted him out. He would not go and finally they dragged him out by the arms. I saw no other disturbance.

Outside of that incident there was no disturbance in the hall that I could see; while Father Terminiello was speaking no one got up to say anything. I didn't hear anyone say "Kill the Jews," or "Kill the kikes," or "Give it to the kikes," or say anything derogatory to the Jews while Father Terminiello was speaking. The audience was very quiet. Where I was sitting I could only see those right straight ahead up to the stage a little bit to the north, there was a separation there where we were, we were in sort of an alcove room. I could see more than half of the people in the hall. I heard no one get up and shout anything derogatory to the Jews.

After Father Terminiello spoke I think Mr. Smith spoke again. I was there until the end of the meeting and heard all the speakers except Mr. Kister and I only heard part of Mr. Smith's speech. Mr. Smith brought the meeting to a close by saying that we would sing The Star Spangled Banner. That was when the milk bottle came through the window.

Mr. Smith gave a short talk and told everybody to be orderly when they walked out and that they should wait for the signal to go out. We were not able to go out immediately because Mr. Smith said he had to have a signal from the police and plain clothes men when we could go through. We waited about twenty or thirty minutes before we went [fol. 4-48] out. I went with another lady, my daughter, and two people. There were five of us. We decided to hold one

another's coat going so that we would not get pushed around and lost when we got outside. The crowd was out there yet, I would say about the same number of people there as when we went in. The whole street was black with people, that is Ashland Boulevard on both sides of the sidewalk for at least a block either way. I was the first out and when I got down to the sidewalk level one of the pickets stood over me with two bricks in his hand ready to pounce on my head and the policeman knocked his hands down so that he did not hit me. That is the only thing that saved my life.

Cross examination of Mrs. McNamaman:

I received a letter from Smith about the meeting; he invited me to hear Father Terminiello. That is what I went there for.

The letter was addressed to me. I believe I received four or five tickets. I have not got them with me. My daughter drove the car and reached the meeting about 22 or 23 minutes after eight. My daughter looked at her watch. We sat on a couch in the back of the hall. There is a sort of partition in the hall, a sort of alcove room. We sat in the southwest alcove. I could see some of the people in the other alcove on the other side. I heard no one mention Jews there at all. I did not hear anyone say, "Send them back to Russia," nor "Send the Jews back where they came from," nor "Send the Communist or zionist Jews to Russia."

I did not hear Mr. Kister talk. I did not hear Father Terminiello talk about the Jews; he just mentioned Jews [fol. 4-49] two or three times but he didn't mention them disrespectfully.

I do not remember him saying that the communistic or zionistic Jews are undermining our government. He said there was a Morgenthau plan; he didn't say to starve the German people, that was to take food away from the Germans because they had too much—words to that effect. I cannot quote his words. I have not seen the speech. He implied something to the effect that they had too much food.

Counsel showed the witness Plf. Ex. 3.

I do not find any words on that page which would lead me to believe that Morgenthau contemplated that the German people had too much food.

THOMAS J. DEVANE testified for the defendant as follows:

My name is Thomas J. Devane. I live at Peotone, Illinois. I am a farmer. I had been a handicap workman until I broke my neck and then I went to farming. I was at the meeting of February 7. I arrived something between seven and eight o'clock by car. A friend drove us. There were three more with me, a brother, a Mr. Riley and someone whose name I do not remember. Mr. Riley drove, he parked the car some place about a block and a half from this meeting.

I noticed quite a crowd around there. They were in a line of two deep and were parading in front of the building and down by the side and then turning around and going back again, and it seemed most of them had some kind of placards or demonstration things on there. There was [fol. 4-50] writing on the placards. There were some people haranguing the crowd, saying, "Get together, close ranks."

There were double lines, so close that you had to force your way through. I also noticed some police officers at one corner. There were four of them talking together, at another corner four more, and at this end there were some more talking.

I finally entered the building by forcing my way through, the four of us. It took a lot of energy to get through. I said, "Don't hold these lines. These people want to get through", and an officer turned to me and said, kind of roughly, "Are you going in or coming out?" I said, "In." "Get in there then", he said. My companions did not get in with me but the brother got in after ten minutes and Riley got in, ten minutes later on. The fourth man did not get in at all. I don't know what happened to him.

We got into the hall about 7:30 in the evening. The first speaker spoke a bit after eight. The meeting opened by singing the national anthem. The pledge to the flag was taken and the Lord's Prayer recited.

Later in the evening, after the thing got started, bottles and things started hitting the building at an interval of probably one every ten minutes, and stink bombs and brickbats, and one man got up when Mr. Smith made some statement and said, "You are a God damned liar", and there was some officer escorted him out. I heard all the speeches. No one in the audience listening to Father Terminiello got

up and said anything derogatory to the Jews, like "Kill the Jews."

No other man got up to make a loud statement. No one got up and said to kill the Jews, there was no such thing. [fol. 4-51] The audience conducted themselves very decently. The meeting came to a close sometime before eleven o'clock with some song, I don't remember if there was a prayer said.

I did not leave immediately but waited about twenty minutes. Rev. Smith gave the reason why we did not leave for twenty minutes. He said the police were trying to arrange security for us outside, and we would be called out in our turn, according as it was satisfactory. I went out with another man. When we left the building the people there were screaming imprecations at me. They did not know what I believed or what I came for. I never heard Smith before but I have great 'diniration' for him after I heard him.

Mr. Pantelis: I move to strike that out as not responsive.

The Court: Sustained.

Cross-examination of Mr. Devane.

I was invited to the meeting. I got there probably about seven thirty. I sat in the back part of the hall on the right side, maybe ten people from the back wall, that is ten rows of seats from the back wall. I did not notice any partition there.

I heard all of the defendant's speech. Yesterday I sat in an adjoining room. I didn't talk to Mr. Smith or Mr. Dilling. I never saw him until a few minutes ago in the hall with Mrs. Dilling. I did not talk to either of the lawyers about the case. I never saw Mr. St. George before. I do not know him, and I never saw Mr. Dilling before except in the hallway. He did not ask me what I knew about the case, nor did I tell him. I talked to a few outside. I asked Mrs. Smith and Mr. Dilling if it was possible for me to refer to [fol. 4-52] certain documents, like document 62 of the 66th Congress, also the British White Paper and an American State document paper that had the same identical things about the Jews as Father Terminiello had in his speech. He said it would be objected to, that I could not. I read these papers myself and I know their contents, and defendant's speech was in conformity with these papers. Would you like me to state what they are?

The papers which I read did not say that communistic, zionistic, atheistic Jews ought to be sent to Russia where they came from, nor about the Morgenthau plan to starve the German people, nor that the Jews were undermining our government.

Outside of the man who interrupted Mr. Smith, there was one man who walked up the side and the police followed him to the rear, then I saw russling on the side of me of two men. I saw nobody else stand up. I did not stand up and nobody else did. Everybody sat down quietly and listened and they applauded but did not stand up.

I could see facial expressions of people around me. No milk bottle struck me, nor brickbats, nor did I see anyone else struck by milk bottles, brickbats, or stones.

Redirect examination of Mr. Devane:

I do not know what the charges are in this case. I think it mostly relates to the Jews. The papers and documents I referred to are the White Paper and British document gotten out in 1919. At that time England had no representative in St. Petersburg because the communists had got in there, and Weidenhall, the representative of the Netherlands, represented England also. He telegraphed or sent a [fol. 4-53] report via Stockholm to Balfour. He said: "This was organized by the Jews and it will wreck civilization if the powers don't suppress it. It is worse than the war now raging in Europe." This was in the white paper and later was substantiated by another one, but the first one disappeared and that part of the document was eliminated, and it could not be found.

JOSEPH M. GRANEY testified for the defendant as follows:

My name is Capt. Joseph M. Graney, 26th District. I am a captain of police and on the force 23 years, a captain for two years. On February 7, 1946, I got a communication for the Commissioner of Police that there would be a meeting conducted at 37 South Ashland Avenue and I was told to be present. I got there at 6:30 P.M. There were no people there then other than the police officers. I had twenty uniformed men and six plain clothes men. About 7:15 a picket line formed. There were about sixty people with placards displayed marching. The picket line marched

up Ashland Avenue to Monroe Street and down Monroe Street to the alley east of Ashland Avenue and there was peaceful picketing until 8:15. About 9:15 there were about fifty young fellows that came in there, and they threw some bricks, bottles, eggs, tomatoes and everything else, breaking some windows in the meeting place and it resulted that the police officers had to arrest seventeen of them.

At that time the crowd was between 800 to a thousand people; they were marching. There were some hollering, calling names, etc. I heard them say that Gerald L. K. [fol. 454] Smith was a Nazi," and "down with fascism", and several other things. From 7:15 to 8:15 I was stationed on Monroe Street.

The building on Monroe Street belongs to the City of Chicago and we policed it. Ashland Avenue is a boulevard and belongs to the Chicago Park District, and about fifty of the Park Police were there in front of the building on Ashland Boulevard. The entrance to the building is a five step entrance up from the sidewalk and there was a platform, then you walk in, and there is another platform with three steps going into the hall. Some of the police were on the sidewalk and some on the first five steps.

I had two uniformed men inside the door and six plain clothes men inside the hall. The rest of my men were on Monroe Street. I walked in and out of that door. The Park Police were under Captain Ott Lewis. I never went inside the hall. I remained there until 11:45, until everybody got out of the hall. Mr. Smith and Father Terminiello got out the back door at approximately 11:30. I and six or seven police officers assisted them. I saw that they got out of the hall.

The Court: No, I will sustain the objection as to what happened afterwards.

Mr. St. George: Exception.

When I was taking Mr. Smith and Father Terminiello out the back way I was hit with some brick or bottle or something. I don't recall just what it was.

Robert E. Ryan testified for the defendant as follows:

My name is Robert E. Ryan. I am a lieutenant of police, 26th District. I have been a lieutenant two years, and on

[fol. 4-55] the force seventeen years. I was ordered to go to the vicinity of Monroe and Ashland on February 7, 1946, by my captain, Joseph Graney. I got there around 6:30 to 6:35. I had with me ten of my own men and ten outside men, and six plain clothes men were ordered inside of the hall. About 7:15 a group was seen proceeding across Ashland Avenue from the north and they crossed from the west side of Ashland Avenue to around the vicinity between Monroe and Madison. There was a large group in double file with banners and they were singing. They came down the east sidewalk of Ashland Avenue and they were picketing in double line. This line was commanded by a group of men who seemed to be in charge of it. They were blocking the sidewalk in the manner of two's and I ordered them that if they were to parade they would parade in single file, and they would keep moving in single file instead of a double line. Then they went in a single line but they doubled up so that it was actually a double line, but on the move as a single line. I would not permit them to stop. These men were right alongside of each other in a perfect chain.

They were body to body, and in the first group in the crowd of people there was about 500 to 600, and later on in the evening, from eight o'clock on they were augmented by another 200 or 300 people; in all there may have been a thousand people. They were congregated all around the vicinity on either side of the street. We did not allow any crowds to stand there on the north corner of Monroe and Ashland. We ordered a group of three or four there to move on. The line was there and was on the move. The picket line was carrying banners and marching and yelling. [fol. 4-56] They yelled, "Down with Gerald Smith, he is a Nazi. Down with fascism", and several things I could not remember, and general words aimed at the people at the meeting on the inside, words to that effect about fascism mostly. During this time I was stationed on the northeast corner of Monroe and Ashland, right at the side of the building. Several times I was at the entrance door. There were other skirmishes. The first occurrence was at about 8:30. A large brick was thrown through the window and hit the front of the building, then a stink bomb was thrown and hit the front of the building and another one landed on the steps in front of the building. There were bricks and toma-

toes and general missiles of all kinds flying through the air.

About 9:15 I saw a crowd of about forty boys, and they were all ganging up there, and I just went down to the front of the door to kind of straighten out the picket line and the men, mostly all park men, were on the top of the steps. I was going up to the first steps and there was some kind of altercation against the door. I was going up the steps when this young group broke through in a wedge and came at us in a flying tackle and we were down, myself and the rest of us, the majority of the policemen that were on the steps were down. There must have been about ten patrolmen on the steps.

I saw these young men group and form in the lines. I saw them prior to that. I knew the kids, they were all white. There was a few colored there, but I don't think—. We placed about seventeen under arrest, the ones we could get hold of who took part in the wedge. I think we got [fol. 4-57] about six or seven of that group. They did not get through our line. We held the line and the rest of them fled, and all were gone except the ones we had.

I saw nothing that went on in the hall and heard none of the speakers. Captain Shanahan and Captain George Ott Lewis were in charge of the Park Police.

I never saw Father Terminiello until yesterday.

Cross-examination of Capt. Graney:

I gave this group instructions to go from two to one and the majority of them followed instructions.

Mrs. Gerald L. K. Smith testified for the defendant as follows:

My name is Mrs. Gerald L. K. Smith. I live in Detroit, Michigan.

I am the wife of Gerald L. K. Smith, married 24 years the next 21st of June. I have one son who was in the Army. I know Father Terminiello. I met him several months ago. I was at the meeting on February 7th. I got there between 7:15 and 7:30, in a hired limousine, accompanied by my husband, Father Terminiello and Mr. Kister.

We arrived at the front entrance. I saw around 1500 people congregated there and parading down the side of

the building, walking very close together. They had signs and placards.

They were walking practically body to body. A policeman met us at the car and had to open the line so that we could get through.

The building was practically already filled. I remained throughout the proceedings. After I entered the hall I went back to the back stage and left my coat and came back to the front of the hall again near the entrance and talked with our friends. They had drawn the curtains.

[fol. 4-58] Up to the time that Father Terminiello spoke I saw the people gathering and the confusion as they came in. I heard noises outside.

They were calling, "Get rid of Hitler. We don't want Hitler in America," and "Down with fascism," and such things as that. Inside the hall there were no noises, just the noise of the congregation of people and talking to each other and greeting each other.

After the start there was no other noise inside the hall except that of the speaking. I believe we opened the meeting with the Lord's Prayer, the salutation to the flag, and the singing of "America." There were a number of speakers before Father Terminiello spoke.

My husband spoke about three quarters of an hour, then Mr. Kister, who spoke around 20 to 30 minutes, perhaps. While these two were speaking there were noises of the crowd outside calling and saying something. I could not get from the platform what they were saying there.

The windows in the hall were all along one side of the front. When I first came in the windows were intact, but later on I saw several of them had been broken, really most of them were broken.

They kept breaking them all through the meeting. They just kept throwing in. I cannot tell you just when they were broken.

I noticed the attitude of the audiences during the time the Father spoke.

They were very attentive and very quiet. There was no noise among them except once in a while when they liked something, they applauded. I didn't hear anything else or see anything else that the audience did while Father Terminiello was speaking.

[fol. 4-59] I did not hear the audience yell or say in a loud voice or some of them get up and yell "Kill those Jews,"

or "Kill them," or anything that sounded like that. There was nothing like that at all. I was sitting on the platform.

When the meeting was over the audience did not leave the hall immediately. The officers in the place advised them not to; to wait until they told them to leave. When the officers told them to leave the people just gradually dispersed. My husband, Father Terminiello, Kister and Mrs. Dilling remained there for an hour or an hour and a half after the audience was dismissed, during which period there were police officers with us, about ten or twelve on the inside, then on the outside there was a considerable number. It is hard for me to judge how many because I went out of the door first and I jumped into the car immediately. There were lots of policemen around. (On objection of plaintiff, court strikes the last answer.)

Mr. St. George: Did anything happen to you when leaving the hall?

Mr. Pantelis: Objected to.

The Court: Sustained.

Cross-examination of Mrs. G. L. K. Smith:

The officer who came in at the conclusion of the meeting sent word up to Mr. Smith. I was present during the meeting and during the talk of the defendant.

I heard the statement about non-Christian doctors but I cannot say that those were the words that he said exactly. He talked about amputating limbs but I cannot say that he said Germans. I do not recall him saying that the nurses were injecting syphilitic germs and other germs into the [fol. 4-60] Germans. He talked about non-Christian doctors and perhaps nurses. I am not sure whether he said non-Christian nurses also. I do not recall him saying that zionistic, atheistic, communistic Jews should be sent back to Russia where they came from, he talked about the Communists but I am not sure that he said that zionistic, communistic and atheistic Jews were undermining our government. I heard Father Terminiello make several different speeches and cannot recall that he referred to the people outside as scum.

Elizabeth Dilling, testified for the defendant as follows:

My name is Elizabeth Dilling. My address is 701 Gordon Terrace, Chicago. I am a communicant of the Episcopal

Church. My occupation is research work, writing books, bulletins and some lecturing. (The court refuses to permit counsel to go into more detail as to the witnesses research work.)

I am Director of the Patriotic Research Bureau and have been engaged in these activities about fifteen years, since 1931.

I wrote books against Communism and atheism in defense of Christianity and I have written monthly bulletins for some years. In connection with my activities as Director of the Patriotic Research Bureau, I kept voluminous records.

(The court sustained objections as to the nature of these records and how secured.) These records were accumulated from communistic periodicals that list their own organizers and leaders and are card indexed and placed in alphabetical order so that the source which is a communist [fol. 4-61] publication can be referred to. I keep a card index file of people and organizations. (The court sustains objections to the question whether the witness's records contain material or data relating to the activities of Ira Latimer, the complaining witness.). The communistic Daily Worker of February 8, 1943, is marked Def. Ex. No. 2 for identification.)

Def. Ex. No. 3 for identification is the Annual report of the American Civil Liberties Union, called "Land of the Pilgrims' Pride", for 1932-33, particularly page 24 thereof. Def. Ex. No. 4 for identification is a leaflet entitled, "Fight War", of the National Committee for the Student Congress Against War. Def. Ex. No. 5 for identification is a copy of the communist Midwest Daily Record for May 3, 1938, particularly pages 1 and 2 thereof. Def. Ex. No. 6 for identification is a copy of the communist Midwest Daily Record for June 24, 1938, particularly page 3 thereof. Def. Ex. 7 for identification is a copy of the Communist Sunday Worker for August 4, 1940, particularly page 2 thereof. Def. Ex. No. 8 for identification is a copy of a booklet called "7½ Million Speak for Peace", by the American Congress for Peace and Democracy, particularly page 13 thereof.

Mr. Dilling states that these various papers are not designated as communist but that they are definitely communistic. Mr. Dilling offered to introduce these exhibits to show that Ira Latimer's activities were communistic in contradiction

to his statement on his cross examination that his activities were not communistic.

Further, that these documents would impeach his testimony and show his bias and give an insight as to why this [fol. 4-62] action against Father Terminiello was really started. The court overruled the motion.

Mr. Dilling: On the evening of February 7, 1946, were you in the vicinity of the West End Woman's Club?

A. Yes.

I arrived there in an automobile. I saw there howling pickets with signs.

I heard the people there say, "Dirty Nazis," "Fascists," and curse words of various kinds.

There were several hundred people congregated there. I arrived there between 7:00 and 7:30. I had trouble in getting into the hall. I asked the police to help me get in.

The pickets formed a solid line and you could not get through it unless somebody helped you. I called to the police that I wanted to get in, to come and escort me. They came and helped me in and I went through. They formed lines in between and I went in.

After I got into the building I chatted with people in the reception room. We made five or six trips to the front window. I saw there the growing crowd of pickets and the increasing noise, and I heard howling. (The answer of the witness that the noises sounded like the jungle, just savage vicious murderers, on motion of plaintiff, was stricken.) I remained in the room outside of the hall until the meeting started, about eight or a quarter after. I then sat on the platform, from where I was able to hear and see everything that transpired in the hall. The meeting opened with two verses of "My County 'Tis of Thee" and the Lord's Prayer. Mr. Smith spoke. (The court does not permit witness to [fol. 4-63] state what Mr. Smith said as to "keeping the audience quiet.")

I believe Mr. Kister spoke very briefly first and then Mr. Smith. There was so much noise I could not tell how long he talked.

Father Terminiello followed Mr. Smith and he spoke perhaps for an hour or less. While Father Terminiello was speaking, the Fire Department entered, and a man in the back of the hall got up and said, "You are a God-damned liar," and was ushered out by the police. Windows were

breaking, lights were flashing outside. The howling drowned out the speaker's voice sometimes. The rear door was being bashed in, trying to crash it in under the platform.

A Jewish War Veteran kept breaking in the vestibule, insisting he had a right to come into the meeting. There were a number of attempts to rush the meeting and to come in. There was warning given that everybody should sit quiet and not become panic-stricken, and there was breaking of glass.

Mr. Pantelis: Your Honor, I move to strike that.
The Court: Strike it.

Q. Was there anything in Father Terminiello's talk that would tend in your mind to make you go out and break the peace?

Mr. Pantelis: Objection.
The Court: Sustained.

I observed the effect Father's speech had upon the audience. They were quiet and attentive.

Absolutely no one got up in the audience while he was speaking. I certainly did not hear anybody in the hall get up and shout "Kill the Jews," or "Send them back to Russia."

[fol. 4-64] The meeting closed with prayer and the Star Spangled Banner. We did not leave immediately after the meeting closed.

Finally, I left the hall with a police officer, Miss Le Gant and a young soldier who was assistant to Father Terminiello. (The court did not permit the witness to go into what happened after the meeting was over.) Somebody gave the order not to leave after the meeting was over. (This statement on motion was stricken.)

Cross-examination of Mrs. Dilling:

The defendant in his speech cited a report to the effect that non-Christian doctors amputated the limbs of Germans who came to them. He did not say it was true, he said that a doctor in Ohio told him that. I really cannot recall that he said anything about non Christian nurses injecting syphilitic germs into Germans who came to them.

I believe he said that the Morgenthau plan, which was the plan of F. D. R., was to starve the Germans. I believe that

was the general impression of it. I heard the defendant say that communistic Jews, zionistic Jews and atheistic Jews should be deported to Russia where they came from, that, in general, was the gist of it. I don't recall that he said that zionistic, communistic and atheistic Jews were undermining our government. I am the ex-wife of Mr. Dilling.

A question of the defendant's contempt of court in making a certain gesture came up in chambers. The court found the defendant guilty of contempt and stated that he would sentence him at the close of the trial and that his bond was [fol. 4-65] going to be fixed. The mittimus would be stayed until after close of the trial.

After discussion off the record The Court: I am going to let the order stand and I want to warn you any further conduct, or any further smirking at the jury is out. You are a defendant in this court, and nothing else.

Mr. St. George: May I make an offer of proof that Mrs. Dilling would testify that Mr. Smith announced at the end of the meeting that he received word from the captain of police that the audience should not leave until the mob outside was quieted, and that the audience did not start to move out until about twenty minutes thereafter, and that the captain of police would not permit Mrs. Dilling or Mr. Smith or Father Terminiello or Mr. Kister to depart until about an hour afterwards, when they were permitted to leave from the rear of the building with a police escort, and in leaving, Mrs. Dilling was hit with a lead pipe, or some kind of a pipe, and disabled for a day, that they did not leave in the automobile Mr. Smith came in because that automobile was disabled by the mob outside, the tires all punched full of holes and the automobile damaged in such a way that the repair bill was $310.50. The court stated that it would permit proof of anything up to the time of the speech, but as to matters that occurred afterwards, he would not.

Florence Hoban Griesel testified for the defendant as follows:

My name is Florence Hoban Griesel. I live at 3454 North Lincoln Avenue, Chicago. I am a housewife and candidate for Congress from the Tenth District. I was at the [fol. 4-66] Woman's Club. I got there at a quarter of

eight. When I got there I saw many pickets moving about and hundreds of them carrying signs. They were very close together. When I tried to get in I was almost pushed on my face, I was kicked, I was spat on, I was called vile names and I was sworn at. I finally got to the door.

I saw several police on the outside.

When I got in I met Mr. Smith standing near the entrance and said "How do you do" to him.

I walked up to the platform and sat down, on the way greeting some of the people I knew. I noticed that the blinds on the windows were pulled down. After the bricks started coming through I noticed the panes of glass there.

Shortly after we said the Lord's Prayer and took the pledge and sang "America," as soon as the meeting started, it seems to me that most of the commotion of the brick throwing was then. I noticed a brick right in my line of the direction that I could see, that caused the shade to come way out, and many people had to jump up. The shade flew back like this (indicating) and there was a terrific smash. Everybody jumped up.

I also noticed that the windows were constantly being broken. This went on all during the meeting. I sat on the platform. Father Terminiello started to speak quite late in the evening.

The audience received his speech very quietly. No one jumped up and yelled, "Kill the Jews, and send them back to Russia."

Q. Did anyone in that audience attack any one present in the audience?

A. No, sir.

[fol. 4-67] Mr. Pantelis: I object to that last question and move to strike out the answer. Nobody ever said anybody was attacked in that audience.

The Court: Strike it.

The meeting came to an end by singing The Battle Hymn of the Republic; and prayer. Mr. Smith told us to go out quietly and we did (on motion of plaintiff this was stricken).

The audience did not go out immediately (the court did not permit the witness to give the reasons why the audience did not go out immediately.)

I left around eleven o'clock.

Cross-examination of Mrs. Griesel:

I heard as much of the defendant's speech as I could with the noise going on in the back and trying to break in. There were times when I could not hear very much for the missiles outside.

I was watching the windows when the bricks came through. This went went on during the entire meeting. I could not help keeping my eyes fixed there, it was right in my vision.

I did not hear the defendant say non-Christian doctors amputated limbs of Germans whenever they came to them, whenever they thought they could get away with it. I do not remember whether he said exactly that non-Christian nurses were injecting into the German people syphilitic germs and other diseases. I cannot remember, it is two months. I did not hear the defendant say that communistic, zionistic, atheistic Jews should be deported to Russia where they came from. I remember he mentioned the Morgenthau plan to starve the German people, isn't that what it is? [fol. 4-68] I do not remember him mentioning starving the German people. I do not remember him saying that atheistic, zionistic and communistic Jews were undermining our government. I heard him say that our government is not a democracy, it is a republic. Everybody knows that. I did not hear him refer to our former vice president as Henry Adolph Wallace.

Mr. St. George, out of the presence and hearing of the jury, called the court's attention to "a peculiar atmosphere" on the part of prosecuting attorneys and even on the part of the court and of the newspapers that does not make for a fair trial. The court accused the defendant of smiling sarcastically when certain remarks were made about what defendant did and as to a certain gesture that the defendant made in the presence of the jury.

Mr. Pantelis charged the defendant with twice during the trial holding his nose, the first time when the witness was testifying, the second time when the witness was getting off the stand.

The court accused Mr. St. George that when the trial started today there was an observer of the Bar Association present when the first witness was on the stand and that he saw St. George look at a juror and wink and make some movement of his face towards the juror. This was declared by St. George not to be true.

Mr. Dilling stated that a lawyer, Landon Chapman, a director of the Chicago Civil Liberties Committee; an organization making this complaint, in the presence of two or three witnesses said: "We ought to kill the son of a bitch", directed at Father Terminiello.

The Court stated: Whatever difficulty has been raised, [fol. 4-69] in my opinion, has been raised by the defendants. This has been a difficult case to try because we have had a court room filled by the different people, different groups, some of them followers of your particular client and some of them followers of some other wild theory. . . . I am not going to tolerate in the court room anything from either side.

One day in the hall I noticed one group arguing with the other group about their various ideologies. I ordered the bailiff to stop them.

Mr. Dilling stated that on the first appearance in court, before setting for trial, as Mr. Smith left the court room he was confronted by a young man by the name of Philip Vision, who actually threatened his life, and that man had sat in the court room throughout the greater part of the trial.

The Court stated that if a petition was prepared and evidence presented, the court would hold him in contempt. Mr. Dilling stated that many witnesses were afraid to testify because the Civil Liberties Committee and their friends would get their names and addresses and occupation and immediately seek to have them lose their position and their liv-lihood; that this amounts to intimidation of witnesses.

The Court stated that if the matter was presented to the Court it had power to, and the Court would act.

Mr. Dilling called the court's attention to an article on the back page of the Chicago Times in large type which said in effect that the court was quoted as saying that the defendants did not have to think that they were going to be treated in the court like they were in the Sedition trial in Washington. The Court stated that he did not make such a state- [fol. 4-70] ment but that he stated that he did not propose to have a situation develop such as in the Sedition Trial in Washington; that had a motion been made in the beginning by counsel, the Court would have given serious consideration not to allow the jury to separate during the trial of

the case as there seemed to be so much fever and heat in the case.

Mr. Dilling called the Court's attention to the Walter Winchell broadcast of the preceding night as being very prejudicial to the defendant, wherein he led his hearers to assume that the defendant had been convicted of the charges he stood charged with. The court stated that he would give an instruction to cover anything in the newspapers or anything else that came up in the corridor so far as trying to prejudice, or directing their attention to it is concerned.

The Court: In your statement, Mr. St. George, you stated there was a peculiar atmosphere on the part of various persons and of the Court.

Mr. St. George: I stated I felt your honor was prejudiced. You do not know what you are in for. You do not know this fight unless you are in it. I didn't know what it was. It was never brought to my attention as it was that night. I would not have believed what I saw if anybody had told me. And then I have been in the sedition trial. I know what vengeance there is in those that are back of this trial. Now, we were not permitted to bring out the fact who is actually back of this trial. It is not the City. The City has no interest in it even though the City attorney is represented. It is another group altogether.

The Court: I don't know how you can do that in a case [fol. 4-71] of this kind unless you will be here for the next five months, and I don't propose to do that. I think I have given you every opportunity so far as presenting a picture is concerned, so they know what happened.

The following proceedings were had before the jury.

Madeline Kister, testified for the defendant as follows:

My name is Madeline Kister. I live at 1100 North La Salle. My husband's name is Frederick Kister. I am a doctor's assistant. I was at the meeting on February 7, 1946. I took up all the tickets and admitted everyone at the door. Invitations were sent out and the tickets were just sent to people that we knew, supposedly. Admission was by ticket only.

Plf. Ex. 1 was the ticket of admission and only those who had such tickets were admitted. We tried to refuse admit-

tance to (certain persons) even though they had tickets of admission.

I was assisted at the door by George Vose and Dr. McDaniel. George Vose is national secretary of the Christian Veterans of America. I know Michael Karel.

We tried to keep him out that evening but he would not stay out. I know Mr. Karel because he has attended quite a few of my husband's book reviews and he claims he is on the mailing list and he isn't.

I stayed in the front of the hall all night. Dr. McDaniel and Mr. Vose stayed there until they closed the doors at 8:20. At 8:20 we had to close the doors because they were going to rush them.

[fol. 4-72] At that time the hall was partly filled. There was a mob outside the doors. I noticed quite a few police outside and one uniformed policeman was by me and he kept that position all evening. From my position I saw missiles, bricks and stones, smash in the windows and heard noises constantly outside.

I was not able to hear all the speeches that evening, just a word here and there. At 8:20 we asked the police to close the doors and not allow anybody through. I asked the one policeman to ask the others out in front to close the one door and we also kept the other doors closed. Besides the front door there was no other door. Between the front door and the second door there were some steps, sort of a vestibule. Both doors were closed.

The front door was glass and it was smashed. The second door was glass. Nothing happened to it. I do not know if there was anyone between the front door and the second one. After we closed the doors, Mrs. McManaman called up and asked permission to get through and I asked the police to let her through because she came all the way from Winnetka.

Cross-examination of Mrs. Kister:

I did not have charge of mailing the tickets, nor did I check the mailing list. I do not know how many tickets were mailed out.

Redirect examination of Mrs. Kister:

The court refused permission to Mr. St. George to show by the witness the complexion of those who attended, such as lawyers, doctors, etc.

[fol. 4-73] DONALD J. MCDANIEL testified for the defendant as follows:

My name is Donald J. McDaniel. I live at 1419 East 60th Street. I have been a dentist since 1923 and specialize in extracting of teeth, meaning oral surgery, and dental x-ray for the past twelve or fourteen years. Extracting teeth is a specialty. I was at the meeting on February 7, 1946.

I was instructed to be at the front door to receive the invitation cards that were sent out from the people coming in. I did this. I was stationed in the front of the building at the inside door. With me were George Voss and Mrs. Kister and a policeman just immediately on the outside of that door.

Miss LeGant may have been there part of the time. I was there practically all the time from the time the meeting started until the crowds filed out. I was able to hear and see what was happening.

The people started coming in a few minutes to seven. The hall must have been filled a few minutes after eight when they closed the doors. I heard the crowd hollering, "Hang Smith, kill Smith", and things like that, and making a chanting noise.

I got to the hall about a quarter to seven; there were very few people assembled in front of the hall. I had no trouble in getting in. On the inside there was an orderly meeting going on. I did not see any confusion on the inside.

I saw some stones that went through the window and fell on the floor. I saw three, and a large piece of coal that was thrown through, so big (indicating about 3½ square inches), and half of a street paving brick, coming from the front window to the right as you enter. These missiles came into the meeting after it was in progress, before Father [fol. 4-74] Terminiello spoke.

I noticed the people when they came in, and who came in. We let them in, taking up their invitation card. If they did not have an invitation card they did not come in. We questioned some of them and some insisted on coming in despite our objections.

Cross-examination of Dr. McDaniel:

I cannot say that I turned away anyone. This was between the outer door and the inside door, about ten or

twelve feet. I was stationed immediately back of the inside door on the same level as the hall.

To my left was a sort of an ante-room, to my right a larger room, part of the hall extends back, sort of alcove. I did not take all the tickets that came in. I did not mail out any tickets. I do not know how many were mailed out. My guess is that there were between 800 and a thousand people in the hall. I was told the capacity of the hall was between seven and eight hundred.

It was filled pretty well to capacity, they would not let any more in. There were some standing in the rear. The doors were closed by the police. There were more than two or three hundred people who had tickets and were turned away who couldn't get in because the place was filled. I came there about 6:45 and took my station on the inside. I knew the defendant before that night.

I spoke to Mr. St. George a few minutes this morning. Mr. Dilling spoke to me about coming in when he told me I was going to be called. I have talked to nobody else about this case. I have not been here since the trial started. This [fol. 4-75] is my first time today. I have an office downtown.

Redirect examination of Dr. McDaniel:

My office is at 31 North State Street. I know that people who had tickets could not get in because they told me so. I heard there were some turned away that could not get in because the hall was filled.

Mrs. Clara Schneider testified for the defendant as follows:

My name is Mrs. Clara Schneider. I live at 4929 North Leavitt Street. My occupation is housewife. My husband's name is Charles. He is a mechanic. I was present at the meeting February 7, 1946. I got there about a quarter to eight. Myself and my husband had difficulty getting in. We were unable to enter the auditorium as the picket lines were double. They were walking very closely and we could not get through, so two policemen came out and asked us if we wanted to get in. We said "Yes". He said "You have tickets?" and we said "Yes", so he divided the picket lines so we could get through. We had a little difficulty, they were marching so closely together, and as we were passing through they kicked and spit on us and tried to trip me, and called us names, such as "Nazis" and "Fascists" and

"Hitler". And one of the boys put his foot down below so that I just tripped; I didn't fall, but tripped over it.

I had an invitation to the meeting which I presented at the door and was allowed to enter. We sat down about the eighth to the last row on the right side of the hall. From that time until the first speaker talked, I noticed that the [fol. 4-76] windows were being continually broken and the stench bomb odor, you could hardly stand it. The first speaker started speaking a little after eight.

The meeting was opened with the Lord's Prayer, the Pledge of Allegiance, and I believe the singing of America. The meeting was opened by Mr. Smith, who spoke about forty minutes. Father Terminiello began to speak about nine or possibly a little later. Up to that time they (the people outside) were hollering and screaming at the top of their voices. It was just a confusion. It was hard to hear what they were saying but the windows were being broken and crashed in just continuously, and the curtains were hanging in shreds. When Father Terminiello spoke there was not a bit of disturbance inside the hall. The audience was very quiet and very attentive. There was no disturbance during his speech. The meeting came to an end about 10:30; I am not sure, and Mr. Smith and Father Terminiello made an announcement.

Q. And what was that announcement? (objection).

The Court: Sustained.

Mr. St. George: Exception.

The people started to leave the hall about a half hour after the speeches.

Q. Were you given any reason for the wait? (objection sustained).

During Father Terminiello's speech I heard no one get up and yell "Kill the Jews and send them back to Russia"; nothing like that.

[fol. 4-77] Cross Examination of Mrs. Schneider

I arrived at the hall about a quarter to eight and the police opened the picket line, they separated the pickets to let us in, one police on each side. They had to hold the boys back so that we could get through.

When I entered the hall I had to climb about eight steps. A person on the top inside another door took up my ticket and I seated myself about eight rows from the rear on the right, just a little before the alcove, just about fifty feet. We were in the auditorium direct. In the alcove there were no seats, just davenports and chairs. People were seated there. There were about four or five windows in hte alcove, two were facing west and two or three were facing south.

In the whole auditorium there were about seven windows, five in the auditorium and two in the alcove. I talked about the case with my husband. I am not a member of the Woman's Club. I was there once before for a book review by Mr. Kister.

I and my husband were on the mailing list and I received my invitation through the mail. I saw half a brick that was right near me thrown through the window. There was another large piece of something, I don't know what it was, coal, stone or clay, but it was large, and a lot of broken glass around. I did not count how many windows were broken. The breaking of windows continued for a considerable time.

I cannot tell you how many times during the course of the evening windows were smashed by the missiles but it was very often and almost continuously all evening from the time the speaker started to speak, even before that, before [fol. 4-78] eight o'clock until past ten.

I do not know just when the defendant finished his speech. He was talking about ten o'clock. The windows began breaking at eight o'clock and they continued breaking windows until after the speaker finished at ten o'clock, not successively, but at intervals. I could not see the faces of the people in front of me but when I turned around I could see the faces of the people sitting in back of me.

CECILE KEEFE testified for the defendant as follows:

My name is Cecil Keefe. I live at 6209 South Laflin Street. I am a secretary-stenographer employed by Theodore W. Miller. I am twenty, unmarried, living with my parents. My mother's name is Grace Keefe. I attended the meeting at the West End Woman's Club with my mother and a neighbor, Mrs. McGuire. We arrived about ten minutes after eight. We had difficulty in getting in. Directly in front of the building I lost my mother and her

friend. The picket line was so close I saw I would either have to get into it or to engage in physical encounter to get through, so I joined the line and moved with them to the front of the building, and then left the line. I heard curses repeated, with obscene language. I wouldn't want to repeat them.

I do not know how I separated from my mother but I got inside and my mother was not with me. She and the friend came in about two or three minutes later. I waited for her at the entrance inside. I and my mother and Mrs. McGuire seated ourselves in the rear on the right, south side of the auditorium. I saw seated there you (St. George) [fol. 4-79] and your wife and your son, about two rows in front of us. When I came in I heard noises outside, mass shouting.

When I took my seat I also heard noises from the mob outside. It was a sort of rhythmical cadence, "Down with Smith:" They were marching along the south side of the building at that time, the side we were sitting on. While Mr. Smith was speaking a rock came through the window on the south side. It was directly to the right of us and I remember the split second the rock came through and the crash and sound, and I saw your son jump up in front of you to protect you from flying glass.

The Court: Strike the last part of it (the answer).

When this rock came through the policeman had already come around to pull the shades down to check the momentum of anything that would come through, but it was only three feet, I believe, away from us, and it was thrown with such force it had come a few feet inside the window, and I saw glass spatter out drop on the floor. I remember Mr. Smith's speech generally.

I recall generally what Father Terminiello said. I noticed the attitude of the audience while he spoke. It was extraordinarily calm. There was no disturbance whatever. No one in the audience during his speech got up and yelled, "Kill the Jews, send them back to Russia."

The meeting closed about 10:30. I left about 20 or 25 minutes after the speeches closed.

Cross-examination of Miss Keefe:

Theodore Miller is a lawyer. His office is at 30 North LaSalle Street. I have not seen the defendant in Mr. Miller's

[fol. 4-80] office. Mr. Smith has been there on occasions. Several people talked to me about the case.

I have not talked with Mr. Dilling except I said, "Good morning" to him. I did not talk to him nor to Mr. St. George about the case. I did to Mr. Miller.

L. ELIZABETH ANDERSON testified for the defendant as follows:

My name is L. Elizabeth Anderson. I live at 1816 West Monroe Street. I am married and belong to the First Congregational Church. I am a member and treasurer of the West End Woman's Club, and a director. Def. Ex. 9 for identification is a bill handed to me by the corresponding secretary.

Def. Ex. 9 for iden.—a bill for $76.75 for installing glass in doors and windows.

Outside of the presence of the jury, counsel offered to introduce the said exhibit 9 as a repair bill for 28 windows broken at a cost of $76.75.

Objection. Objection sustained.

(The trial was resumed.) On February 7, 1946, I walked over to the West End Woman's Club and arrived there to find a large picket line with banners marching around; there was such a crowd of them that policemen had to make way for me and I followed the police and walked in. On the banners was that Smith was a fascist, things of that order. There were a great number of people in the picket line. There were also police. I had a ticket like Plf. Ex. 1 and I was admitted.

I did not take a seat right away, I went and looked out of the window. I saw groups of people on the street and across the street. I heard plenty of noise. They were [fol. 4-81] screaming and jeering for all they were worth.

At first I sat in the back and afterwards I sat on the platform where I sat the balance of the evening where I could hear and see. I think the meeting opened with prayer, then I think we sang The Star Spangled Banner, or America.

I was invited to make a few remarks in the microphone, which I did. (The court sustains objection as to what she said.) The first speaker was Mr. Kister who just opened

the meeting, then Rev. Smith, who made some remarks and then he introduced Father Terminiello.

Then Father Terminiello spoke and every now and then there was some pop, some window was broken, then there was pounding on the back door; I could hear there was some commotion at the front door. The audience were all keeping calm. No one in the audience while he was speaking yelled "Kill the Jews, send them back to Russia," or anything of that nature.

I heard windows breaking, there were 28 windows broken. The meeting lasted until after ten o'clock. I did not leave immediately after it concluded. Rev. Smith started them singing hymns. I left the hall with my son and his girl friend.

Cross-examination of Mrs. Anderson:

I was not one of the persons responsible for engaging the hall. I am a member of the West End Woman's Club. I am not a member of "We, the Mothers." The Anderson running for Congress is my son.

Mr. St. George stated: The defendant has about another one hundred witnesses whose testimony will be corrobora- [fol. 4, 82] tive of the testimony of the other witnesses who testified as to the conditions outside of the hall before the meeting and as to the conditions in the hall before Father Terminiello spoke and as to the conditions inside the hall during the speech of Father Terminiello, and that all these witnesses were witnesses who were admitted on invitations or cards.

Arthur William Terminiello testified in his own behalf as follows:

My name is Arthur William Terminiello. I live in Birmingham, Alabama, and am a Catholic priest, duly ordained as such by the Bishop of Manchester for the diocese of Mobile, Alabama, in June, 1938. My theological studies were made at St. Mary's Seminary, Baltimore.

I was born April 11, 1906, in Boston, Massachusetts. My father was of Italian extraction. My mother was native born. I entered upon my ministry in the diocese of Mobile, Bishop Thomas J. Toolan. My first assignment was second

curate for two years, then, after several temporary assignments, I was assigned permanently to the missions of central Alabama, of which I was director. This district takes in 20 counties in the southern part of the state. I was head of this for about eight years and then I was assigned to Huntsville, Alabama, where I remained about two years, and after that, Sacred Heart Church in Anniston, Alabama, from where I retired, and then was suspended. I retired from active pastoral duties so as not to embarrass the Bishop by my activities, and was suspended by the Bishop.

Suspension in the Catholic Church means that a clergy [fol. 4-83] man is forbidden to exercise certain privileges and functions. There are four or five degrees of suspension, I received the least of the four or five. At that time I had already retired and moved to Birmingham. I received no notice of my suspension except what I saw in the paper. At that time I was engaged in giving public lectures, writing sermons for distribution, and distributing, and printing these sermons. I heard of "The Crusader" and of "Rural Justice."

On November 7 I was still engaged in giving public lectures and in the publication of a newspaper called "The Crusader," and various sermons, tracts and other publications.

Gerald L. K. Smith asked me to speak at the gathering on February 7, 1946, under the auspices of one of the ladies Clubs.

I did not come directly from Birmingham as I was making a tour of various large cities and came from some other large city. The subject assigned to me was "Christians Awake." I got one of exhibit one in this case. I believe Mr. and Mrs. Smith, Mr. Kister, and probably one or two others left the hotel about five minutes past eight, in a hired car. We got there approximately fifteen or twenty minutes past eight. The car stopped at the front entrance. There was a crowd of three or four hundred congregated there shouting and cursing and picketing. I believe this building was on the corner.

When we got there the pickets were not marching; they were body to body and covered the sidewalk completely, some on the steps so that we had to form a flying wedge to get through. Police escorted us to the building, and I noticed four or five others there.

[fol. 4-84] They called us "God damned Fascists, Nazis, ought to hang the so and sos." When I entered the building I heard the howls of the people outside. For about two or three minutes I stood in the back to greet the workers and then went to the side of the stage. I stood there for about fifteen or twenty minutes. There were four or five plain clothes officers standing at the entrance to the stage and three or four at the entrance to the back door.

The officers threatened that if they broke the door again they would arrest them and every time they opened the door a little to look out something was thrown at the officers, including ice-picks and rocks.

A number of times the door was broken, was partly broken through. There were doors open this way and they partly opened and the officers looked out two or three times and each time ice-picks, stones and bottles were thrown at the police at the door. I took my place on the stage, before this I was about ten or fifteen minutes in the body of the hall.

I saw a number of windows broken by stones or missiles. I saw the back door being forced open, pushed open.

The front door was broken partly open after the doors were closed. There were about seven people seated on the stage. Smith opened the meeting with prayer, the Pledge of Allegiance to the Flag and singing of America. There were other speakers who spoke before me and before I spoke I heard things happening in the hall and coming from the outside.

I saw rocks being thrown through windows and that continued throughout at least the first half of the meeting, probably longer, and again attempts were made to force the [fol. 4-85] front door, rather the front door was forced partly. The howling continued on the outside, cursing could be heard audibly in the hall at times. Police were rushing in and out of the front door protecting the front door, and there was a general commotion, all kinds of noises and violence—all from the outside.

Between the time the first speaker spoke and I spoke, stones and bricks were thrown in all the time. I started to speak about 35 or 40 minutes after the meeting started, a little later than nine o'clock. I did not give a prepared speech, I just prepared an outline and I cut a good deal of it.

I have seen Plf. Ex. 3 and I recall that the court reporter admitted certain inaccuracies therein.

Thereupon certain corrections in Plf. Ex. 3 were had by agreement which appear in said exhibit: On page 38 thereof, from "unsolvement" to "enslavement"; on page 40 from "motion" to "Russian"; on page 43, from "counsels" to Communist," from "wholly" to "gradual", from "principles" to "press", and "former" before Chief Justice of the United States in the last paragraph, stricken. On page 45, "radio head to direct Carroll George of the Democratic Republican" changed to "the court to grant a writ of habeas corpus to Doctor Carl George of the Dominican Republic". On page 46, from "refugee" to "lex fuga"; on page 47, from "free bowls of soup" to "three bowls of soup"; and from "infection" to "inflation". On page 48, the third line from the top, from "win" to "serve"; and in the next paragraph, first line, from "money" to "moment". On page 50, the first paragraph, second line, from "blood" to "soil"; on page 51, the first paragraph, from [fol. 4-86] "thoats" to "threats"; and the last paragraph, from "mythical" to "mysterial", and from "rather" to "as." On page 55, the first paragraph, second line, from "hoisted" to "foisted"; in the second last paragraph, strike out "not" before "strong enough"; and in the last paragraph, first line, from "Veteran" to "we are." On page 57, the fourth last line, from "vigilance" to "phalanx"; and from "intimidate" to "undermine". One page 58, second line from the top, from "permit" to "promote"; next line, from "demobolize" to "demoralize"; in the fifth line of the next paragraph, from "members" to "principles." On page 59, first line, from "find" to "found." The question referring to inoculation is entirely misquoted.

At that time someone from the audience interjected, "How about inoculating with germs?" And this was my answer: that I had also heard that story of inoculating with various germs and intravenous injections, so done to the prisoners of war and other Germans.

I did not use the word "non-Christians." I did not refer to any race or religion in that part. I said "these people I have been talking about."

On page 48, sworn to "win," should be, sworn to "serve." The second line on page 49 should be "Immediately after the incident, the air waves are going to be filled with orations, patriotic songs."

"Odors" should be "orations." On the bottom of page 49 it should read, "I should not have put my hand up," "not" has been omitted.

On page 46, after the "lex fuga," there should be noted: "the law of flight that opened the concentration camps and said, 'All right, boys, run for it.'"

The paragraph on page 52, "or that his name happens [fol. 4-87] to be Ginsberg, then we are . . ." should end with "then we are considered to be anti-Semitic."

The story of the two friends who went to a hotel, on page 52, is garbled. The "gum" is wrong, and the end should be: "'The tooth brush? That is going too far.' And the Jewish boy said, 'You are anti-Semitic'".

In the middle of page 54, the word "cane" should be "cadence", namely, "there must be someone to beat a cadence". On page 55, "It is the same kind of tolerance", should be, "It is the same kind of intolerance."

I did not refer to the people on the outside and inside of the meeting as "scum".

(The court did not permit the witness to answer whether in making this speech the witness frequently referred to newspaper articles or copies out of newspapers and magazines).

If, on page 51, I said we should not love the criminal, I made a mistake, we should also love criminals but not the crime.

Q. Did you intend to make a distinction between what you call good American Jews and communistic zionistic Jews?

(Objection.)

The witness answered, "Absolutely."

The Court: Sustained. Answer stricken.

Q. Has it been your intention at any time to condemn the entire Jewish race or the Jewish religion?

(Objection.)

A. No, sir.

The Court: Sustained.

I did not, in my speech, say that all Jews in this country should be sent back to Russia.

[fol. 4-88] Cross-examination of Defendant:

I had no other notice of my suspension by Bishop Toolan until I read it in the paper. After that I received a direct notice.

Suspension deprives a man of the right to administer the sacraments, to preach sermons and various other spiritual functions; it silences me as far as sermons go, but does not deprive me of free speech.

I was not deprived of the right to wear the vestments of a clergyman; I have no right to perform weddings.

A layman can perform baptism in an emergency, as where the child is apt to die.

I have no right to hold Mass on Sunday and I can administer Communion at the legitimate request of the faithful, such as the last rites of the church. A layman cannot administer the last rites.

My use of the word "scum" was an extemporaneous part of the speech. It was due to the fact that my own people were spat on and kicked and bruised. (Motion to strike and statement stricken.) I told the story about the judge and the ten dollar fine for contempt of court.

The statement about the slimy scum that got in by mistake was an intemporate remark about the conditions that existed. It was the extemporaneous part, all the first part.

I made the statement in the next paragraph in substance. The firemen came in while Smith was talking; they were responsible for their coming in. The firemen said that.

The next paragraph should be "robe" instead of "role" of a fool.

[fol. 4-89] The quotation "bull" on page 40 of the speech refers to the communist pickets outside.

I did not know personally any of the people on the outside. I did not have time to see anybody. I did not recognize any of them. I had nothing to do with the collection of the tickets. I found out afterwards that people came in by invitation. I heard the dentist testify this morning and say that a lot of people couldn't get in who had tickets.

When I used the word "bull," my people knew what I was talking about, they knew I mean Reds, Communists. They laughed at it and applauded. The people there that night were American citizens. Citizens do not act the way the people outside acted. I would be surprised to learn that there were divinity students outside in that crowd. I saw a mass of people and I saw a few faces.

I did not see men with hands or arms missing in the picket line, but I saw some inside. I recognize a service discharge button and honor it. There were Jewish War

Veterans from the American Army out in front. I respect them, but I don't respect them when they create a mob.

(Mr. Dilling objected that the witness could not answer because he did not know they were honorably discharged). I would consider a veteran of the last war an American citizen. If he broke the law he would be no better than any other criminal.

On page 43, the statement about "most of them probably are imported. They are imported from Russia, certainly," is garbled. I said, in effect, Certain people in this country want to put in Swarzwald in place of Edgar Hoover, and I also said, "We must aid the F. B. I. If anybody knows [fol. 4-90] who is in that picket line, the F. B. I. wants to know", and "Send me the name and I will send it in to the F. B. I."

On page 46, "cross lines" should be "Gripsholm", a ship. They were sent to Siberia. By that I do not mean the United States Government, as they do not take part in that kind of fenagling, but the Administration, which administers the Government for a particular time, it is not the Government.

I mean United States government officials, and they played a trick on these people by releasing them and arresting them, and they sent some of them to Siberia, before we entered the war and after. I have the facts here if you will let me refer to my notes. I can't do it without refreshing my memory.

(The court struck the statement of the witness that his statement on page 45 at the bottom about "officials from Washington went to South America", was taken from the Chicago Tribune). The number of these persons taken may reach 100,000.

I made the statement on page 47 as to the Morgenthau plan and as to the doctor in Akron, Ohio. I know who is back of it but I did not know whether the people knew. I meant certainly there were no Christians behind it. No Christian would do a thing of that kind. Pagans would do it.

I did not mean the Jews. I meant the Jews and others, anybody who would do anything like that. The audience would know it was the same type of person who is trying to undermine the country. I did not assume the audience knew something that I was not telling them. I was talking about any kind of man who would commit mayhem. It is

evident from the context that I was making a complete [fol. 4-91] hearsay statement. I suggest that we put men who commit mayhem in jail.

Proceedings of April 2, 1946—Cross Examination of Defendant continued.

I was correctly quoted as to the story on the amputation of the limbs of every German.

When I said, "He and others of his kind", I meant the kind that would amputate a limb, criminals. I proposed no plan about what to do about it.

Someone in the audience, unknown to me, at that moment reminded me of a "plan to sterilize them". I would not guarantee that I said "all of one race". I said they were non-Christians.

I did not mean Jews only; if Mohammedans did it, I meant them. I gave the substance of the information I received from my friend in Ohio. He said that non-Christian doctors and non-Christian nurses were doing these things.

There are many non-Christians besides Jews. I said the quotation beginning on page 40 and over to page 41 (plf. ex. 3) about the millions murdered by the Communists in Russia, and I meant it, too. The people outside (of the hall) wanted to form the type of government that would tolerate rape and murder. They were communists, that is what communists want; I know who made up the mob.

I arrived at the hall in a private hired car and was escorted by police when I got there. I found the howling mob of communists outside saying to get rid, one way or the other, of Fascists and Smith and all the others. I did not see that specific sign.

I did not see the sign with the word "kill". I arrived at twenty minutes past eight and it was light enough to see. [fol. 4-92] There were flashes going, probably fifty photographers with flashes.

I got out on the curb side of the door; I don't know which way the car was facing; right in front of the building. There was a large crowd there, most of them standing. I did not see any picket line; I saw a mob. I remained on the sidewalk several minutes, for enough time for police to open the line for me and my party to be escorted into the hall. Of course I could not see all the faces of the people gathered out in front. I saw some of them.

They said kill him, hang him.

At the time I used the words about the communists I was referring to slavery. I didn't refer to rape at all.

It was not my intention to refer the entire statement, which includes murder, rape and slavery, to the howling mob outside, you may interpret it that way, that was not my meaning; I said it in the record. I usually say what I mean, I am not afraid to say what I mean. I mean what is in the paragraph, the way it is in the record. The first notice I had of my suspension was when I read it in the paper. Subsequent to that I received a communication from my bishop. I haven't that communication, it is down south.

It appeared in the paper sometime in the end of November, 1945, and I read it. I read the communication sent to me by the bishop.

Henry Adolph Wallace, on page 43, ex. 3, should be Henry Agaard Wallace. I did not call him Adolph. The word "wholly" should be "gradual".

The next paragraph on page 43 about Chief Justice Stone is substantially correct with the corrections made.

[fol. 493] The paragraph on page 53, ex. 3, about big brothers, tolerance and the bed bug, is substantially correct.

The following paragraph, "We are not strong enough", should be "We are strong enough." That is substantially correct, and the word "league", after philosophy, should be deleted. I find the eye for eye philosophy in the Talmud and in the Kabbala, which are Jewish religious books. The Kabbala is a system of philosophy, only the Talmud is a religious book. This philosophy is also found in the historical books of the old testament.

When I said, "We are not going to be tolerant of their smears any longer", I was referring to the Jews. I am correctly quoted in the paragraph on page 54, ex. 3, about mob reactions and rhythm in violence. We expected violence from the outside. I am substantially quoted in the following paragraph, page 54, about walking out and the police protecting the audience, but "don't do it", should be "don't you do it, on the bottom of page 54.

The last paragraph on page 55 should be, We are going to say "we are" Christian Veterans and proud of it, we are not "going" to be tolerant of their blasphemy, otherwise I am correctly quoted. The next paragraph on page 56 of ex. 3 is correct in substance.

The next paragraph beginning at the bottom of page 58, about the $10,000.00, is in substance correct.

I never got the $10,000.00. I wrote him a letter, returning the $10,000.00 check. All corrections on page 57 of pl. ex. 3 have not been made. I do not remember the phrase, "every attempt to persecute our cross", it does not make sense. [Vol. 4 944] (Counsel agreed that those six words be stricken.) As corrected, the statement substantially contains my entire statement.

Redirect examination of Defendant:

Over objection of counsel, the court did not permit the witness to answer what philosophy he had in mind when he spoke about philosophy of destruction and philosophy of enslavement.

By "bull", I meant the communists. The court did not permit the witness to give his authority nor sources of information as to his statement that there were eight to fifteen million people murdered in Russia.)

Q. Is America a democracy, or is it a Republic.

Objection.

The Court: Sustained.

(The court sustained the objection to the question whether the witness knew that the Supreme Court of the United States had called this a republic or a democracy.)

The quotation of Mr. Wallace as to the revolution in America is reported in the American magazine. I have the document here, or rather the article comes from newspaper items on that date.

Mr. Wallace's middle name is Agaard. The quotation from Chief Justice Stone is a quotation from the opinion rendered by the Supreme Court.

(The court sustained the objection to the question as to where the witness got his facts with reference to the South American affair.) I know an attorney in New York by the name of George Dix. (The court sustained the objection to questions as to whether the witness knew that George [Vol. 4 945] Dix of New York was interested in these cases and that the witness read the account thereof in the Chicago Tribune.)

I read the article in January, carried in the Chicago Tribune, pertaining to that. The correct quotation is that the Tribune carried an article in which it told a story of the

refusal of the court to grant a writ of habeas corpus to Dr. Carl George of the Dominican Republic.

(The court struck the answer that the Morgenthau plan is not Christian.) I knew what the Morgenthau plan is. I have studied it.

(The court did not permit the witness to say what the Morgenthau plan is.)

In my speech I said that reconversion is not a war job but a peace job, and I said that Franco was the saviour of what was left of Europe. (The court did not permit the witness to answer whether the two foregoing statements were original with him, or whether he read some of the statements.)

In my speech I said that we must love the Jews, the Italians and everybody, that does not mean that we must love the errors of these people.

I knew that the people in the crowd were communists because I knew a communist meeting had been held prior to that to arrange for it. I had seen the literature they had put out.

Def. Ex. 10, 11 and 12 for identification, is the literature I refer to.

Def. Ex. 10 for iden. is an 8½ by 11 inch plugger of the Socialist Workers Party asking members, sympathizers etc. to mobolize at the party headquarters at 160 N. Wells St. Room 317 Feb. 7, 1946, at 6 P. M. sharp, where instructions [fol. 4-96] would be given about picketing the Smith meeting "Gerald L. K. Smith, America's most notorious Fascist", who will speak "under the auspices of a fascist clique called 'Christian Veterans of America'"; and ending with "We will then proceed to the demonstration. All out to fight Fascist Smith."

Def. Ex. 11 for iden. is a 12 by 9 plugger of the Workers Party of U. S. dated Feb. 6, 1946 calling for "Picket G. L. K. Smith" "America's No. 1 fascist, strike breaker, anti-Semite and Negro hater."

Def. Ex. 12 for iden. is a plugger of the Socialist Workers Party, Chicago Local, calling upon the members and friends to stop Fascist Smith, who aims to smash organized labor, whose stock in trade is Jew, Negro, red and labor baiting.

(The court sustained an objection to the introduction of said exhibits.) I had read their literature with reference to meetings held by Smith. I saw Def. Ex. 13 for identifica-

tion, being an article from The Sentinel, on the editorial page.

Def. Ex. 13 for iden. is a page from "The Sentinel, America's Largest Anglo-Jewish Weekly Devoted to Unity in Jewish Life," headed: Gerald L. K. Smith Plots Chicago Riots. When is the Justice Department Going to Act? By J. I. Fishbein. Contains the following: "We intend to make it impossible for Smith or any of his ilk to meet in a public meeting place anywhere in Chicago. * * * We intend to drive Gerald L. K. Smith and all his 'Hatelers' out of our city into a common jail where they properly belong."

(The court refused said exhibit into evidence. The court refused to permit counsel to introduce into evidence Def. Ex. 4 for iden. headed "CCL charges Gerald L. K. Smith".) [fol. 4-97] Is the February 15th 1946 issue of the "Civil Liberties News", Editor Ira Latimer, Vol. 2 No. 7, headed "CCLC Charges G. L. K. Smith, Terminiello, Kister with inciting breach of peace. States that after the Committee learned that said meeting was to be held it authorized Ira Latimer to attend and to seek the arrest of anyone who violated the law by inciting to a breach of the peace, thus endangering the civil rights of other citizens; that Latimer and another director attended the meeting; that after Father Terminiello told the story about the non-Christian doctor Latimer left the hall and found "Judge Samuel Heller, who had left the meeting earlier, * * * and he agreed to issue a warrant for the arrest of the speakers who were violating the law;" that at the Desplaines police station Judges Heller and Caplan, with a bailiff and clerk, opened an emergency court session to issue the warrants for the arrest of Smith, Terminiello and Kister and to fix bond for a dozen youthful pickets held on disorderly conduct charges; that Ira Latimer is the complaining witness, and "the issue is where does free speech stop and incitement begin."

The Talmud is the official Jewish religious books which contain the Old Testament teachings or interpretations of those teachings by rabbis throughout the United States, also the legal decisions pertaining to its ritualistic rules, which are found there. The Kabbala is a system of philosophy which is held by the religious Jews, which anticipates the coming of the temporary, materialistic messianic kingdom and which also attempts to interpret it.

(The court did not permit the witness to answer as to [fol. 4-98] who are the zionistic Jews or who the American Jews.)

Recross-examination of Defendant:

My speech was delivered from notes. I did not write out the entire speech, except the direct quotes.

Thereupon the defendant rested his case.

The Court: I will also overrule the motion as to striking evidence, the plaintiff's motion, that is, I will overrule the motion.

Thereupon the plaintiff introduced the following evidence in rebuttal.

Kerwin Gaede testified for plaintiff in rebuttal:

My name is Kerwin Gaede. I live in Waukegan, Illinois. I am a minister of the First Congregational Church of Waukegan. I was ordained a minister in November, 1942, by the Chicago Congregational Association. There are 180 members in my church. I was in the picket line on February 7, 1946, at 37 S. Ashland Avenue, Chicago, Illinois.

Paul J. Folino testified for plaintiff in rebuttal as follows:

My name is Rev. Paul J. Folino. I live at 2901 East 91st Street. My occupation is a Protestant clergyman. I was in the so-called picket line on February 7, 1946. I happened to be lead man on the picket line.

Cross-examination of Mr. Folino:

I am a minister of the United Churches, Presbyterian and Congressional. I am an ordained minister, ordained [fol. 4-99] by the Congregational Association, by the whole association. I was not ordained by any bishop. I believe in the Divinity of Christ.

St. George: Do you believe in the sanctity of an oath?

Mr. Iseberg: I object.

The Court: Sustained.

I was the lead man of the picket line.

St. George: How did you happen to know there was going to be a meeting that night?

Mr. Iseberg: I object.

The Court: Sustained.

How did you go there, or did you go there by accident?

Mr. Iseberg: I object.

The Court: Sustained . . . I do not care how he came there.

There was one other clergyman present and about 1500 other people there.

Lloyd Fallers testified for plaintiff in rebuttal as follows:

My name is Lloyd Fallers. I live at the University of Chicago dormitory. I am twenty years of age.

I was in the so-called picket line in front of the West End Woman's Club.

Robert E. Reid testified for plaintiff in rebuttal as follows:

My name is Robert E. Reid. I live at 1005 East 60th Street. I am a student. I served in the last war. I was in the picket line in front of the West End Woman's Club.

[fol. 4-100] Cross-examination of Mr. Fallers:

I was in the company of three of my friends. There were a goodly number of people there. I do not know how many.

Q. Were you arrested by the police?

Mr. Iseberg: I object.

The Court: Sustained.

Peter Raible testified for the plaintiff in rebuttal as follows:

My name is Peter Raible. I am sixteen years of age, a student at the University of Chicago. I was in the picket line on February 7, 1946, in front of the West End Woman's Club.

Cross-examination of Mr. Raible:

Q. Were you arrested by the police?

Mr. Iseberg: I object.

The Court: Sustained.

St. George: I want to show they were arrested and want to prove it.

The Court: You can make your offer of proof before we go to lunch.

MARIE HELEN KLEIN testified for plaintiff in rebuttal as follows:

My name is Marie Helen Klein. My address is 5345 Maryland. I am a student, a Catholic. I am from Cullman, Alabama. I was in said picket line on February 7, 1946. There were possibly 1500 people there. I go to St. Thomas Apostle Church at 55th and Kimbark. I noticed the people there. Some of them I saw when they passed me in [fol. 4-101] line. I saw other ones and sometimes I saw them more than once. I was marching in the line. As I was marching I saw them to the right, to the left, and in front of me.

Q. Were you able to tell what race they were?

Mr. Iseberg: I object.

The Court: Sustained.

I noticed some black people there and other ladies in the crowd and in the picket line.

Q. Did you throw any missiles?

Mr. Iseberg: I object.

The Court: Sustained.

I did not see any thrown.

I saw a great number of policemen there but I am not familiar enough with the police to know who is a lieutenant or something else. I remember a number of police congregated at the front door of the building. I did not see any flying wedge of about fifty members of the people around there make a dive for the police and trample them down.

I was there from eight o'clock until possibly 9:30.

THOMAS J. STAPELTON testified for plaintiff in rebuttal as follows:

My name is Thomas J. Stapleton. I am employed in the office of the City Clerk. I have the record of the fifth class amusement license issued in 1946 to the West End Woman's Club. (The witness was not permitted to testify further as to the alleged license.)

Proceedings of April 2, 1946, at 2:30 P. M.

The City rested its case in rebuttal. The defendant rested. [fol. 4-102] Which was all the evidence offered and received at the trial of said case.

The jury excused until 9:30, April 3, 1946.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. St. George: I just want to make a motion. May it please the Court, at the close of all the testimony in the case, both for the plaintiff and defendant, I move for a directed verdict for the defendant on the ground that the charge as construed in connection with the speech alleged, which is the subject of arrest, would be in contravention of the 14th Amendment, the "due process" clause, and further, that to charge this defendant with committing a misdemeanor because he gave the speech in question is a contravention of the First Amendment to the Constitution.

PLAINTIFF'S MOTION FOR INSTRUCTED VERDICT

Mr. Pantelis: I have a motion to make. That the Court instruct the jury to find the defendant guilty, without any further instructions or arguments:

The Court: Well, I don't think that is proper at the present time. You have rested.

Thereupon an adjournment was taken until April 3, 1946, at 9:30 A.M.

Proceedings April 3, 1946. Instructions offered by plaintiff and refused by the Court.

DEFENDANT'S REQUESTED INSTRUCTIONS, REFUSED

Mr. St. George objected to the refusal of the Court to give the following instructions for defendant:

"The jurors are instructed that a public meeting is a meeting that is open to the general public, that is to say, to all who may have the opportunity and desire to attend, some notice of the time and place of the meeting having been given intended and adapted to reach the public generally, and that if they find from all of the evidence that the meeting at which the defendant spoke was not such public meeting, they should find the defendant not guilty."

[fol. 4-103] "The jurors are instructed that any act or utterance of the defendant alleged to constitute the offense

charged must have been a public act or utterance, that is openly and within public sight, hearing and knowledge."

"If you believe from all the evidence that there existed a breach of the peace, if any, before the defendant made his speech, and that the defendant's speech was not the cause of any breach, if any, then you are to find the defendant not guilty."

"The Court instructs the jury that the right of free speech is a national right, federally guaranteed, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. And you are instructed to weigh carefully any evidence which would have a tendency to cause you to restrain or deny to the defendant his constitutional right of free speech."

"The court further instructs the jury that they must consider whether there was a clear and present danger flowing from the defendant's speech that said speech would tend to breach the peace. The jury are instructed that no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for discussion. If there be time to expose through discussion the falsities, to avert the evil by processes of education, the remedy to be applied is more speech, and not enforced silence. Only an emergency can justify repression of the constitutional right of free speech."

"The jurors are instructed if they believe from the evi-
[fol. 4-104] dence that the meeting held at the West End Women's Club on the evening of February 7, 1946, was a private meeting, and not a public meeting, they must vote to acquit the defendant."

Defendant's Objection to Plaintiff's Requested Instructions

Mr. St. George: And I object to the giving of instruction asked by the plaintiff in this case, to the effect that: "The jury are instructed that derisive or annoying words which tend to arouse those addressed to a breach of the peace, when uttered at a public meeting, constitute an improper diversion tending to a breach of the peace. Whether or not the words are insulting, derisive, or annoying, is not to be determined by how any one individual reacted, but by how men of common intelligence might react," on the

ground that this is not the law, consequently it does not fit the facts; that the evidence is uncontradicted that the breach of the peace, if any, was caused, and was had and in being long before Father Terminiello ever spoke, that any words that Father Terminiello might have said could not have, by any possibility, reached the crowd outside of the meeting; that the crowd outside was not in a position, and could not have heard anything that Father Terminiello said, and did not hear anything that Father Terminiello said; and that the evidence is undisputed that the audience inside was quiet, peaceful and calm.

Mr. St. George objected to plaintiff's instruction 4 with reference to insulting words, epithets and personal abuse uttered at public meetings of people, that the said utterances might constitute a clear and present danger of an improper diversion tending to a breach of the peace, ngithe instruction 3 or 4 was the law.

[fol. 4-105] The Court warned those present not to make any demonstration in court.

The following proceedings were then had in open court in the hearing and presence of the jury.

Argument of Mr. Pantelis to the jury.

Argument of Mr. Dilling to the jury.

The Court convened at 2:00 P. M., April 3, 1946.

Argument of Mr. St. George to the jury.

Closing argument of Mr. Pantelis to the jury.

Instructions of the Court to the Jury

"This is a prosecution for violation of an ordinance. The section upon which the information has been filed provides: 'Did make, or aid in making an improper noise, riot disturbance, breach of the peace, or diversion tending to a breach of the peace within the limits of the City.' "

"If the Jurors believe from all the evidence that the defendant did not intend to create a diversion tending to a breach of the peace or if the statements made were not likely to provoke violence and disturbance of good order, even if no such eventuality be intended."

"The Court instructs the jury that an assemblage of large numbers of people by special invitation could make the place for the time being a public place."

"The Court instructs the jury that breach of the peace consists of any misbehavior which violates the public peace

and decorum. The misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace [fol. 4-106] and quiet by arousing alarm. The word "peace" as used in breach of peace means tranquility enjoyed by citizens where good order prevails."

"The jury is instructed that any improper conduct on the part of any person or persons inside or outside of the meeting hall at the time in question has no bearing whatsoever on the question of the defendant's guilt or innocence of the charge herein, and you are instructed to disregard the evidence, if any there be, pertaining to such improper conduct on the part of such other person or persons."

"You are instructed that if you believe from the evidence, under the instructions of the Court, that the defendant made statements which, constituted a diversion tending to cause a breach of the peace; and if your further believe from the evidence that at the time and place in question, the statements so made by the defendant, Terminiello, were provoked or incited, in whole or in part, by the improper conduct or actions of other persons inside or outside the meeting hall in question, you are, nevertheless instructed that such improper conduct or actions of such other persons is no justification or excuse for the statements, if any, made by the defendant."

"The Court instructs the jury that the verdict that jury arrives at should be signed by the foreman and eleven of the jurors and instructs the jury that it is their first duty to select a foreman."

The jury retired to the jury room.

Verdict

The verdict of the jury finding the defendant guilty in the manner and form as set forth in the complaint and fixing his penalty in the sum of $100.00 signed by twelve jurors. (No designation as to who was foreman.)

[fols. 4-107-109] Defendant's Motion for Judgment Notwithstanding Verdict, etc.

Motion of defendant for judgment notwithstanding the verdict, or alternative for a new trial. (For grounds see Rec. 21).

MOTION IN ARREST OF JUDGMENT

Motion of defendant in arrest of judgment.

The Court entered the foregoing motions and set them for hearing April 8, 1946.

ORDERS AND JUDGMENT

April 8, 1946, 9:30 A. M. The Court overruled the defendant's motion for judgment notwithstanding the verdict, and the defendant's motion for a new trial, and defendant's motion in arrest of judgment, and entered judgment on the verdict. Defendant fined $100.00 and costs of $10.00.

ORDER ALLOWING APPEAL

Defendant prayed an appeal from said judgment to the Supreme Court of the State of Illinois which was allowed on the defendant filing his appeal bond in the sum of $500.00 instanter, bill of exceptions to be filed in sixty days.

CERTIFICATES

Certificate of the trial judge dated June 20, 1946.

Certificate of the Clerk of the Municipal Court that the foregoing is a true, perfect and complete Transcript of the record—dated June 25, 1946.

Maximilian J. St. George, Albert W. Dilling, Attorneys for Appellant.

[fol. 4-110] IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1946

CITY OF CHICAGO, Appellee,

vs.

ARTHUR TERMINIELLO, Appellant

Appeal from Municipal Court of Chicago

Honorable John V. McCormick, Judge Presiding

Additional Abstract of Record

COMPLAINT

Complaint of Ira Latimer, filed February 13, 1946, that the defendant on February 7, 1946, in Chicago: (1) did make or aid in making an improper noise, riot, disturbance, breach

of peace, or diversion tending to a breach of the peace, within the limits of the city, in violation of Chapter 193, Sec. 1, Sub-sec. 1 of the Revised Code of 1939 as amended.

Plaintiff's Exhibit 2 in words and figures as follows:

[fol. 4-111] PLAINTIFF'S EXHIBIT 2

The Father Coughlin of the South, Father Terminiello, Will Speak Here

DEAR PATRIOTIC FRIEND:

Father Arthur W. Terminiello, the radio Priest of the South, has agreed to speak in Chicago on the 7th of February. This young Priest, age 39, is responsible more than any other single individual in America for bringing about the investigation of the Pearl Harbor scandal.

Father Terminiello has been referred to by many as the Father Coughlin of the South. The same people who hate Father Coughlin hate Father Terminello. They have persecuted him, hounded him threatened him, but he has remained unaffected by their anti-Christian campaign against him. You will hear all sorts of reports concerning Father Terminiello. But remember that he is a Priest in good standing and a fearless lover of Christ and America. His dynamic and historic radio address entitled "The Cross of War" has had a circulation running up into the millions.

Father Terminiello is a true Christian Nationalist. He is editor of The Crusader. He is the director of a rapidly growing movement known as The Union of Christian Crusaders.

I wish it were possible for me to preside over a meeting where I could introduce Father Charles E. Coughlin. Unable to do this as yet, I consider that Father Terminiello is the best, if not the only, substitute that can be found in the United States.

I enclose herewith a few extra cards. These cards will go like hot cakes! Everyone you see will want them. Therefore, make wise distribution of them.

A special committee has rented the auditorium of the West End Woman's Club. Although it has ample facilities [fol. 4-112] we expect it to be well filled to hear the courageous message of this young Priest. Doubtless what he has to say will be one of the boldest and bravest public statements to which you have ever listened. The slogan should be:

Christ or Chaos—Christian Nationalism or World Communism—Which?

Sincerely yours, Gerald L. K. Smith.

GLKS:L.

Remember

Date: Thursday, February 7, 1946.
Place: West End Woman's Club.
Time: 8 p. m.

COLLOQUY

Mr. Pantelis (Atforney for plaintiff):

Now, I believe there is an objection here to the first part of the instruction which the court gave at the request of the defendant, that which had to do with the intent. The instruction reads as follows:

"If the jurors believe from all the evidence that the defendant did not intend a create a diversion tending to a breach of the peace, or if the statement——"

I object to the first part of it.

The Court: You can object to the whole thing, if you want to. That is your privilege.

"If the jurors believe from all the evidence that the defendant did not intend to create a diversion tending to a breach of the peace, or if the statements made were not likely to provoke violence and disturbance of good order, even if no such eventuality be intended."

That is the instruction as modified.

[fol. 4-113] Mr. Pantelis: The objection to that is that it does not go far enough, because it should state—I mean that instruction assumes that violence must result, and I say, if it tends to create a diversion which tends to a breach of the peace——

Mr. St. George: That is what he says here.

Mr. Pantelis: No, it does not state that.

Mr. St. George: Are not like to provoke.

Mr. Pantelis: No, I don't think so.

Mr. St. George: The same objection would pertain to instruction N8. 4 asked by the plaintiff with reference to insulting words, epithets, and personal abuse, uttered at public meetings of people, that the said utterances might

constitute a clear and present danger of an improper diversion tending to a breach of the peace.

I think that is all.

The Court: Off the record.

(Discussion off the record.)

Mr. Pantelis: I will withdraw the interrogatories. Let us go on with the case.

The Court: Now, Gentlemen, are we all through with this?

[fol. 4-114] Mr. St. George: Let the records shows I object to the giving of Instruction No. 3 for the plaintiff as amended, on the ground that that is not the law.

Barnet Hodes, Corporaton Counsel of the City of Chicago, Attorney for Appellee.

A. Herzl Segal, Assistant Corporation Counsel, Head of Appeals and Review Division; A. A. Pantelis, Harry A. Iseberg, Assistant Corporation Counsel, of Counsel.

[fol. 4-115-6] **Abstract of Appellate Court Record**

Placita.

Opening of the Appellate Court on February 4, 1947.

ORDER TRANSFERRING CAUSE

Certified copy of order of the Supreme Court of Illinois transferring said cause to this court, filed February 10, 1947.

Said order of the Supreme Court transfers this cause from the Supreme Court to the Appellate Court, dated January 22, 1947.

Cases taken on briefs filed.

JUDGMENT

Judgment of this court dated June 25, 1947, affirming judgment of the Municipal Court from which order and judgment Mr. Presiding Justice Niemeyer dissents.

ORDER STAYING MANDATE

Order entered July 7, 1947, staying the mandate herein until the filing of petition to the Supreme Court of Illinois for leave to appeal shall have expired.

Order of July 7, 1947, that the decisions herein shall be published in full in the Appellate Court Reports.

Certificate of the clerk of the Appellate Court dated July 11, 1947, that the foregoing is a true copy of the final order and judgment and all other proceedings.

[fol. 7] IN SUPREME COURT OF ILLINOIS

No. 30365

CITY OF CHICAGO, Appellee,

vs.

ARTHUR TERMINIELLO, Appellant

Appeal from Appellate Court First District 46MC 114428 44062

ORDER ALLOWING PETITION FOR LEAVE TO APPEAL—September 11, 1947

And now, on this day, the Court having duly considered the petition for leave to appeal filed herein, and being now fully advised of and concerning the premises;

It is hereby ordered that said petition for leave to appeal be, and the same is hereby allowed.

[fols. 8-9] IN SUPREME COURT OF ILLINOIS

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 20, 1947

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said

cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken; and said cause having been argued orally by Albert W. Dilling for appellant, and by L. Louis Karton for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 10] IN THE SUPREME COURT OF ILLINOIS

No. 30365

Judgment Affirmed

THE CITY OF CHICAGO, Appellee,

vs.

ARTHUR TERMINIELLO, Appellant

Opinion filed March 18, 1948

Rehearing denied May 13, 1948

1. Appeals and Errors—*when Supreme Court is precluded from examining facts—violation of ordinance.* Where the jury in a civil case has found the facts against the defendant, the trial judge has refused to set aside the verdict and the Appellate Court has reviewed the evidence and affirmed the judgment, the Supreme Court is precluded from examining the record except to determine whether there is any evidence to support the verdict and whether the trial and Appellate courts have properly applied the law to the facts, and this rule applies to a proceeding to enforce a penalty for violation of an ordinance. (p. 29)

2. Criminal Law—*breach of peace is public offense whether in public or private place.* The general understanding is that a breach of the peace is a public offense, as it is a violation of the public order and a disturbance of the public tranquility, and while offensive acts, words or conduct

must actually disturb or tend to disrupt the public peace and good order, it is not required that the public disorder must originate in acts committed in a public place, as it is immaterial whether the violation of the public peace and order originates in a private place or on public property. (p. 30)

3. Municipal Corporations—*what conduct and words constitute violation of ordinance against disorderly conduct.* Where a defendant makes a speech at a meeting which, [fol. 11] although admittance was by invitation, was largely attended by sympathizers and sufficiently advertised to attract a crowd of opponents protesting the holding of the meeting, some of whom gained admission to the meeting, the use of epithets and words in the speech expressing contempt for the opponents, resulting in arousing the audience to a feeling of anger and hate and causing shouts of threats to kill, constitutes conduct which violates an ordinance providing that persons who make a disturbance of the peace or a diversion tending to a breach of the peace shall be deemed guilty of disorderly conduct, and it is immaterial that the words and epithets tended to incite violence against third persons rather than against the speaker. (p. 32)

4. Constitutional Law—*abuse of freedom of speech does not present a constitutional question.* The right to freedom of speech is not without limitations, as freedom of speech is not license and the constitution does not absolve one from punishment for the unlawful nature and consequences of his speech, and punishment of a defendant who, in violating an ordinance, is guilty of an abuse of the freedom of speech does not constitute an abridgement of constitutional guaranties nor present a constitutional question. (p. 34)

Appeal from the First Division of the Appellate Court for the First District; heard in that court on appeal from the Municipal Court of Chicago; the Hon. John V. McCormick, Judge, presiding.

Maximilian J. St. George and Albert W. Dilling, both of Chicago, for appellant.

Benjamin S. Adamowski, Corporation Counsel, (L. Louis Karton, A. A. Pantelis, and Harry A. Iseberg, of counsel,) all of Chicago, for appellee.

OPINION

Mr. Justice Wilson delivered the opinion of the court:

A jury in the municipal court of Chicago found the defendant, Arthur W. Terminiello, guilty of the offense of disorderly conduct, in violation of a city ordinance. Judgment was rendered on the verdict and defendant was fined $100. Upon direct appeal, we transferred the cause to the Appellate Court for the First District, no constitutional question being presented so as to confer jurisdiction on this [fol. 12] court. (*City of Chicago* v. *Terminiello*, 396 Ill. 41.) The Appellate Court affirmed. (*City of Chicago* v. *Terminiello*, 332 Ill. App. 17.) We have allowed defendant's petition for leave to appeal.

The action grows out of a meeting held in an auditorium in Chicago on February 7, 1946. The meeting was held under the auspices of the Christian Veterans of America, Frederick Kister, director. Printed invitations, signed by Gerald L. K. Smith, were sent to persons on a mailing list. Each invitation was accompanied by several cards of admission. The invitations announced that Father Arthur W. Terminiello was the "radio Priest of the South;" that he "is responsible more than any other single individual in America for bringing about the investigation of the Pearl Harbor scandal;" that he "has been referred to by many as the Father Coughlin of the South;" and that "the same people who hate Father Coughlin hate Father Terminiello" and "have persecuted him, hounded him, threatened him." With reference to the extra admission cards, the notices read as follows: "These cards will go like hot cakes! Everyone you see will want one. Therefore, make wise distribution of them." Each card states that it will admit the bearer and one friend and that admission is by card only.

The meeting was well attended. Persons desiring to hear defendant speak filled the 800-seat auditorium to capacity, others stood in the rear and about 250 were turned away. An hour before the meeting, a strong picket line was formed in front of the auditorium. The number in the picket line gradually increased to several hundred and a crowd estimated at 1000 persons gathered outside to protest the meeting. Despite the presence of approximately seventy policemen, a number of disorders occurred. Some persons braved the picket line. Others were escorted by police.

Friends were separated. Clothing was torn. Missiles of all kinds were thrown at the building. Twenty eight win- [fol. 13] dows were broken. Stench bombs fell on the steps to the auditorium. Forty boys in a flying wedge bowled over policemen forming a cordon on the steps and almost broke into the hall. Other attempts were made to rush the meeting. Part of the mob tried to bash down the rear door of the auditorium. All during the evening there was much noise. Cries of "Nazies," "damned Fascists" and "Hitlers" greeted those attending the meeting and frequently the crowd shouted and chanted in unison.

Several persons took tickets at the door. Most of those attending the meeting entered by card of admission. Many came in without cards. The mailing list of persons to whom invitations and cards had been sent was not introduced in evidence nor was there any testimony relative to the source and composition of the list.

Smith opened the meeting and was followed by Kister and Terminiello. A transcript of defendant's speech was introduced in evidence. The following excerpts are illustrative: "Now, I am going to whisper my greetings to you, Fellow Christians. * * * I suppose there are some of the scum got in by mistake, so I want to tell a story about the scum. * * * nothing that I would say can begin to express the contempt I have for that howling mob on the outside. * * * And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake. * * * The subject I want to talk to you tonight about is the attempt that is going on right outside this hall tonight, the attempt that is going on to destroy America by revolution. * * * millions more through Eastern Europe at the close of the war are being murdered by those murderous Russians, hurt, being raped and sent into slavery. That is what they want for you, that howling mob outside. * * *

"All of it [Communism in America] can be traced into the great Red menace by the New Deal in Washington. * * * First of all we had Queen Eleanor. * * * Then [fol. 14] we have Henry Adolph Wallace * * *. Now, my friends, they are planning another ruse * * * are going to try to put into Mr. Edgar Hoover's position a man by the name of George Schwarzwald. * * * Didn't you ever read the Morgenthau plan for the starvation of little

babies and pregnant women in Germany? * * *. Why should every child in Germany today not live to be more than two or three months of age? Because Morgenthau wants it that way, and so did F. D. R. * * * You will know who is behind it when I tell you the story of a doctor in Akron, Ohio. He boasted to a friend of mine within the last few days, while he was in the service of this country as a doctor, he and others of his kind made it a practice—now, this was not only one man—made it a practice to amputate the limbs of every German they came in contact with whenever they could get away with it; so that they never could carry a gun. * * * The nurses, they tell me, are going to inject diseases in them, syphilis and other diseases in every one that came there, all of one race, all non-Christians. * * *

"Now, let me say, I am going to talk about—I almost said, about the Jews. Of course, I would not want to say that. However, I am going to talk about some Jews. * * * We must take a Christian attitude. I don't want you to go from this hall with hatred in your heart for any person, for no person. * * * We must love every person * * *. We must not love particularly the criminals among those people. * * * we must condemn the criminals even if they are Jews. We must condemn Communists wherever we find them * * *. But the moment we point to a man and say that man is a Communist, or that his name happens to be Ginsberg, then we are considered to be anti-Semitic. * * * Now this danger which we face—let us call them Zionist Jews if you will, let's call them atheistic, communistic Jewish or Zionist Jews, then let us not fear to con[folklo] demn them. * * * We must not lock ourselves up in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from. We are going to stand one and all together and form a solid phalanx of courage and loyalty and strength, and oppose every attempt to breach freedom of speech in America, every attempt to dilute Christianity in America, every attempt to undermine the morality of America, every attempt to shed American blood to promote Zionism in America * * *."

The testimony relative to the reaction of the audience during the speech is conflicting. The complaining witness, Ira Latimer, stated that the audience did not merely cheer

and applaud; that the people were disturbed and angry, and that the reference to the actions of non Christian doctors and nurses in Germany drew "Ahs," "Ohs" and other expressions of anger from the audience. Lucille Lipman, a Quaker of Irish extraction, testified that when defendant said there was no crime too great for the Jews to commit, the woman next to her said, "Yes the Jews are all killers, murderers. If we don't kill them first, they will kill us," and that at the mention of the amputations performed on German prisoners, the people around her said "Oh" and "Ah" and "Isn't that terrible." On cross-examination, Miss Lipman related that she was so riled and wrought up at all the lies told she was tempted to commit violence. The last witness for plaintiff, Michael Kafek a Jew, testified that when Terminiello spoke of the Zionistic Jews threatening to undermine our country people shouted, "Yes, send the Jews back to Russia," "Kill the Jews," "Dirty kikes;" that later, when the speaker referred to starving German mothers and the Morgenthau plan, persons close to him said, "They ought to starve the Jews" and "They ought to kill Morgenthau," and that, when the speech turned to non Christian doctors and nurses amputating [fol. 16] German men and infecting German women, several women next to him cried, "They ought to do that to the Jews, they ought to cripple them." On the other hand, witnesses appearing for defendant testified that the audience was quiet, attentive and orderly at all times, and denied that anyone shouted threats against Jews.

The ordinance under which defendant was convicted provides, in pertinent part, "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city * * * shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." (City of Chicago, Revised Code of 1939, chap. 193, par. 1 41.) The gist of the charge against defendant was breach of the peace or, in the alternative, a diversion tending to a breach of the peace. Seeking a reversal of the judgment of conviction, defendant contends (1) that his address was delivered at a private meeting and is, therefore, legally insufficient to establish the offense of a breach of the public peace; (2) that his utterances did not create or tend to

create a breach of the peace, and (3) that his speech was protected by the constitutional guarantee of freedom of speech. As to the conduct of the trial, exclusion of evidence or instructions to the jury, defendant makes no complaint.

It must be observed at the outset that the jury found the facts against defendant, the trial judge refused to set aside the verdict and the Appellate Court reviewed the evidence in detail and affirmed the judgment. Under these circumstances, this being a civil case, we are precluded from examining the record, except to determine whether there is any evidence to support the verdict and whether the trial court and the Appellate Court properly applied the law to the facts. *Foreman-State Trust and Savings Bank* v. [fol. 17] *Demeter*, 347 Ill. 72; *Peters* v. *Chicago Railways Co.*, 307 Ill. 202.

Our first inquiry is directed to whether defendant delivered his speech to a public or a private gathering and, indeed, whether the nature of the meeting has any bearing on the disposition of the issue. The general understanding is that a breach of the peace is a public offense, a violation of the public order, a disturbance of the public tranquility. (8 Am. Jur., Breach of Peace, secs. 3 and 6; 5 Words and Phrases, p. 763.) While the offensive acts, words or conduct must actually disturb or tend to disrupt the public peace and good order, we are not apprised of any authority to the effect that the public disorder must originate in acts committed in a public place. Certainly, the ordinance in question makes no such distinction. The essential element of the offense is a public disorder or a diversion tending to a public disturbance. A breach of the peace occurs whenever there is a violation of the public peace and order, and it is immaterial whether the violation originates in a private place or on public property. Cases dealing with the common-law offense of breach of the peace (*State* v. *Stonaker*, 94 W. Va. 576; *Ware* v. *Loveridge*, 75 Mich. 488,) and cases involving statutes and ordinances specifically requiring that the disturbance occur in a public place (*Austin* v. *State*, 57 Tex. Crim. App. 623, 124 S. W. 636; *Terry* v. *State*, 22 Tex. App. 679, 3 S. W. 479), are not pertinent here where we are dealing with an ordinance prescribing an appropriate penalty for "breach of the peace, or diversion tending to a breach of the peace, within the limits of the city."

In support of his assertion that acts constituting a breach of the peace must be committed in a public place, defendant

places heavy reliance on five New York decisions: *People* v. *Monnier*, 280 N. Y. 77, (foul epithets spoken on telephone;) *People* v. *Perry*, 265 N. Y. 362, (fight among three men in a closed restaurant at four o'clock in the morning;) [fol. 18] *People* v. *Reed*, 40 N.Y.S. 2d 793, (distribution of religious literature and playing phonograph in hall of apartment house held private annoyance and not breach of the peace;) *People* v. *Ludovici*, 13 N.Y.S. 2d 88, (no disorder in house to house preaching;) *People* v. *Downer*, 6 N.Y.S. 2d 566, (no evidence of disorder in distribution of anti-Jewish pamphlets.) All the New York cases are distinguishable upon the ground that the words and conduct occurring in private places did not create or tend to create a public disturbance.

Furthermore, even if the acts charged as constituting a breach of the peace must be public in character, defendant's first contention still must fall. The jury, by its verdict, and the Appellate Court, in specific language, have both characterized the meeting which defendant spoke as being public rather than private. The finding is fully supported by the evidence and will not be disturbed. The meeting was attended by eight hundred to one thousand persons. By enclosing several cards of admission with each invitation, those in charge of the meeting permitted each person on the mailing list to invite three or four others who, in turn, could each invite a friend. Thus, by delegation and subdelegation of the right to admission, the meeting was, to all intents and purposes, thrown open to the general public. Testimony to the effect that some persons were admitted without cards only fortifies the conclusion that the meeting was public.

Defendant next argues that his conduct and speech constituted neither a breach of the peace nor a diversion tending to a breach of the peace. The record discloses that Terminiello's conduct and words resulted in actual breaches of the peace both without and within the auditorium. Likewise, his actions amounted to a diversion tending to a breach of the peace. Defendant, self-described as a member of the "lunatic fringe," by his conduct in scheduling an address in a large auditorium, invited a storm of protest, [fol. 19] which was concentrated in the mob of approximately one thousand persons gathered in the public street outside the auditorium. Just as he drew his audience into

the auditorium, he drew hundreds of his antagonists to the area adjacent to the hall. As related, the explosive situation thus created by defendant resulted in innumerable acts of violence extending over a period of several hours. The air was filled with shouts and noisy chanting, property was destroyed, rocks, brickbats and stench bombs were thrown at the auditorium, and both private individuals and police officers were assaulted. The meeting was, indeed, a diversion tending to a breach of the peace.

In addition, defendant opened his remarks by addressing the minority present as "'scum'" and asserting that "Nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake." Alone, these epithets directed to certain members of the audience, constituted action tending to a breach of the peace. *State v. O'Donnell*, 200 Atl. (N.J.) 739.). Plainly, they were derisive, fighting words likely to cause a breach of the peace by the addressee, words whose publication constitutes a breach of the peace by the speaker. *(Chaplinsky v. New Hampshire*, 315 U. S. 568.) As defendant continued with his opprobrious, abusive and insulting stories, one member of the audience arose and shouted, "You are a God damned liar," and was quickly ushered out by the police. Although there is some evidence to the effect that this disturbance occurred when Gerald L. K. Smith was speaking, Karel's testimony that the event took place when defendant was speaking is corroborated by Elizabeth Dilling, one of defendant's witnesses. Upon the record made, the jury was entitled to believe that defendant's utterances incited an actual breach of the peace within the auditorium. Further evidence of the feelings of the minority is Lucille Lippain's [fol. 29] testimony that she was very wrought up and felt like committing violence.

As to the majority of the audience, defendant, by his provocative and inflammatory utterances, instilled in them the fear of revolution, domination and murder by what he described as the criminal Jewish element in America and, more particularly, by the mob outside the auditorium. The evidence amply supports plaintiff's assertion that Terminiello aroused his audience to a feverish feeling of anger and hatred. Defendant asked his audience to take a Christian attitude and then worked them up to a point where there were shouts to kill, maim and starve the Jews and

send them to Russia. In concluding his speech, he used such double talk as "They [the mob] are being led. There will be violence. That is why I say to you, men, don't do it. Walk out of here dignified. The police will protect you. We will not be tolerant of that mob out there. We are not going to be tolerant any longer. We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us. We are not going to be tolerant any longer of their pagan eye for an eye philosophy." In this manner was defendant guilty of a diversion tending to a breach of the peace by his wild, intemperate and inflammatory utterances. His speech tended to incite the majority of his audience to immediate violence against the angry mob outside. That his listeners did not engage in violence with the angry crowd is immaterial, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *People* v. *Most*, 171 N. Y. 423; *Delk* v. *Commonwealth*, 166 Ky. 39,) and not at all remarkable is that the mob was large, organized to a certain degree, and well interspersed with approximately seventy policemen. While utterances tending to create a breach of the peace more commonly involve words and epithets arousing the addressee to do violence to the speaker, we do not perceive any legitimate distinction in [fol. 21] theory or in effect upon the public peace and tranquility where the words charged tend to incite the addressees to disorder and violence against third persons.

Lastly, defendant complains that the judgment of conviction violates both the State and Federal constitutional guarantees of freedom of speech. In cases of which the present cause is typical, it is customary to inject the issue of freedom of speech so as to create the false impression that great constitutional questions are involved and sacred constitutional rights are jeopardized. In the case at bar, defendant was afforded a full and fair hearing before a judge and jury. The ordinance involved is a common one and does not violate constitutional rights. The sole question resolves itself into whether the conduct and utterances of defendant constituted a breach of the public peace or a diversion tending to a breach of the public order and tranquility. The evidence amply supports the verdict of the jury finding defendant guilty.

The right to freedom of speech is not without limitations. Freedom of speech is not license. The constitution does not

absolve one from punishment for the unlawful nature and consequences of his speech. (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Stromberg* v. *California*, 283 U. S. 359; *People* v. *Doss*, 382 Ill. 307.) Defendant being guilty of an abuse of freedom of speech, his conviction and punishment do not constitute an abridgement of constitutional guaranties nor present a constitutional question for decision by this court. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, the Supreme Court of the United States said, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach [fol. 22] of the peace." Singularly applicable is the observation in *Cantwell* v. *Connecticut*, 310 U. S. 296, "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect."

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

[fols. 23-24] IN SUPREME COURT OF ILLINOIS

No. 30365

ARTHUR TERMINIELLO, Appellant

vs.

CITY OF CHICAGO, Appellee

Appeal from Appellate Court First District 46MC 114428 44062.

JUDGMENT—March 18, 1948

And now, on this day, this cause having been argued by counsel; and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as

matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Appellate Court, First District aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant Costs by it in this behalf expended, to be taxed, and that it have execution therefor.

[fol. 25] [File endorsement omitted]

IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed April 12, 1948

[fol. 25-1] To the Honorable Chief Justice and Justices of the Supreme Court of Illinois:

The defendant in the above-entitled cause, petitioner herein, has heretofore filed with this Honorable Court notice of his intention to petition for a rehearing in this cause, in which the opinion was filed on March 18, 1948. Accordingly, he now respectfully and earnestly prays this [fol. 25-2] Court to grant a rehearing in this cause and in support of this petition states the following:

The one and only question involved in this entire proceeding is "freedom of speech" (supplemented by "freedom of assembly", without which "freedom of speech" would in most cases be meaningless). Violation of these fundamental and inalienable Constitutional rights, guaranteed by both the Constitution of the State of Illinois and the United States Constitution, constituted the only reason for the defendant's attempt to take a direct appeal to this Honorable Court (to which reference is made in the affirming opinion), which, as defendant understood it, was disallowed only because of failure first to secure from the trial Judge

a certificate attesting the fact that a Constitutional question, the validity of an ordinance, was involved.

Nowhere did the Appellate Court allege that the defendant failed properly to raise the "free speech" issue either in the trial Court or in his briefs. As the record shows, the Appellate Court ruled against the defendant solely because it held that certain parts of his speech were of such a nature as to fall outside of the "free speech" protection afforded by said Constitutions and as to create an alleged "diversion tending to a breach of the peace", as set forth in the disorderly conduct ordinance defendant was alleged to have violated.

That defendant realized at the very time he was speaking that his precious right of "free speech" was at stake is apparent from the record and from the affirming opinion of this Court, which sets forth part of said speech as follows: "We are going to stand one and all together and form a solid phalanx of courage and loyalty and strength, *and oppose every attempt to breach freedom of speech in America* . . ."

[fol. 25-3] The mob congregated outside of the hall in which defendant spoke was, as the record and even the affirming opinion establish, a lawless, revolutionary mob bent upon suppressing the right of free speech and free assembly. That the defendant realized this is further confirmed by other quotations from his speech included in the affirming opinion. For example, the following: "The subject I want to talk to you tonight about is the attempt *that is going on* right outside this hall tonight, the attempt *that is going on* to destroy America by revolution." This, it should be noted, was at the very outset of his speech. As a matter of fact, and as the record shows, the lawless rioting had been going on for a long time when the defendant starting speaking. How, then, can he justly be charged with *inciting* the riot or with responsibility for the many breaches of the peace that admittedly did take place outside of the hall before defendant spoke, while he was speaking, and long after he had concluded?

This Honorable Court, no doubt through inadvertence, misapprehended the evidence adduced during the trial in the lower Court pertaining to the "cards of admission", or tickets, that were used in connection with the meeting. It is clear from the affirming opinion that this misapprehension played a large part, if not the controlling part, in the

Court's ruling that the meeting at which defendant spoke was a "public" meeting, and not a "private" meeting, as repeatedly alleged by the defendant. For this reason, the attention of the Court is respectfully directed to the following from both the affirming opinion and the Abstract of Record concerning this matter:

[fol. 25-4] The Court, in its opinion, states: "*Several persons* took tickets at the door. *Most of those* attending the meeting entered by card of admission. *Many came in without cards.*"

The Abstract of Record, at page 71, as part of the testimony of Mrs. Madeline Kister, includes the following: "I was at the meeting on February 7, 1946. *I took up all the tickets and admitted everyone at the door.* Invitations were sent out and the tickets were just sent to people that we knew, supposedly. *Admission was by ticket only.* Plf. Ex. 1 was the ticket of admission *and only those who had such tickets were admitted.* We tried to refuse admittance to (certain persons) even though they had tickets of admission."

It is true, as the affirming opinion states, that "the mailing list of persons to whom invitations and cards had been sent was not introduced in evidence", but what Witness Madeline Kister testified to, as quoted above, to the effect that "invitations were sent out and the tickets were just sent *to people that we knew, supposedly*" would, so far as it goes, constitute "testimony relative to the source and composition of the list."

(Emphasis in above quotations supplied.)

Thus the evidence shows clearly that *nobody was admitted without a ticket.* Therefore, this Honorable Court was under a serious misapprehension in this connection, serious because it vitally affects the question as to whether or not the meeting at which defendant spoke was a *public* meeting. The Court must have recognized the importance of this matter, or else it would not have commented upon it as pointedly as noted above. The affirming opinion, at a [fol. 25-5] later point, contains the following: "Testimony to the effect that some persons were admitted without cards only fortifies the conclusion that the meeting was public."

There was no such testimony. On the other hand, the testimony was that *nobody was admitted without a ticket.* Further than that, the testimony quoted above shows what lengths those in charge of the meeting went to try to keep

the meeting "private" rather than "public"—refusal of admission even to some who did have tickets.

It would seem that this one point alone should be sufficient to warrant this Honorable Court in granting this petition for a rehearing and the Court is respectfully urged to grant it.

It is respectfully submitted that the Court misapprehended the facts in holding that the defendant's speech, and, if the Court please, his conduct, while delivering his speech, created "breaches of peace" outside of the hall and also a specific "breach of peace" inside of the hall.

As to the former, the Court is asked to consider the utter impossibility of defendant's speech being heard outside of the hall, or his conduct (if in fact there was anything objectionable about it) being seen by anyone outside of the hall, so as to cause any "breach of peace" or "diversion tending to a breach of peace."

As to the latter, the testimony of various witnesses is admittedly in conflict, so much so as to cast real doubt upon this particular matter. The reference is of course to an alleged *shout* of "You are a God damned liar" by someone in the audience while defendant was speaking. There is so much doubt about this in the record that it seems highly unjust and unfair for the Court to cite and rely upon it as an actual "breach of peace" inside of the hall allegedly caused by the defendant.

[fol. 25-6] Witness Karel's testimony that there was such a shout while defendant spoke is directly contradicted by the testimony of Witness Devane, who testified that the incident happened while Gerald L. K. Smith was speaking, that is, before defendant spoke. Devane's testimony is borne out by the fact that the meticulously accurate and inclusive transcript of defendant's speech and what occurred during it (taken down and transcribed by a court reporter), introduced by the plaintiff (the respondent herein) and relied upon to establish the exact nature and content of defendant's speech, fails to make any mention of it.

That transcript does not contain any mention, either, of the *shout*, "Yes, send the Jews back to Russia", "Kill the Jews", "Dirty Kikes", etc., etc., that Witness Karel testified were made while defendant was speaking. It does, however, record noises occurring from time to time and also records the fact that heavy objects crashed into the

hall while defendant was speaking, having been thrown by the members of the lawless, unruly mob outside. It should be borne in mind that this court reporter was present at the behest of defendant's enemies, including the complaining witness. She, too, was a witness for the plaintiff and her testimony, including the stenographic transcript, is entitled to just as much weight and credence as is the testimony of the other witnesses for the plaintiff. Logically, her testimony is entitled to more weight and credence, for she was merely a disinterested person hired to do a job and take down the proceedings stenographically, whereas the other witnesses were obviously hostile witnesses with a very open and apparent animus against the defendant.

[fol. 25-7] Isn't it fair to assume that had the shout "You are a God damned liar" been made while the defendant was speaking, the court reporter would have recorded it for the benefit of those who had hired her? Isn't it also fair to assume that her transcript of what occurred while Gerald L. K. Smith was speaking does record the incident and bear out Witness Devane?

It is respectfully submitted that there was therefore no actual "breach of peace" inside of the hall and that nothing about defendant's speech or his conduct may justly be said to constitute any "tendency to a breach of peace." For that reason, also, this petition for a rehearing should be granted.

The Court, referring to defendant's use in the speech of the words "scum" and "slimy scum", states: "Alone, these epithets directed to certain members of the audience, constituted action tending to a breach of the peace." Again, it is respectfully submitted that the Court has misapprehended the facts.

These words were not "directed to certain members of the audience"; they were defendant's remarks directed to his audience of 800 or 1,000 persons, as a whole. In the case of *State v. O'Donnell*, 200 Atl. (N. J.) 739, cited by the Court in the affirming opinion, the offensive words were addressed to specific persons and, in that case, too, the words were without question spoken in a public place. To bring the case at bar within the purview of the *Chaplinsky* case, also cited by the Court, and remove defendant's words from the Constitutional "free speech" protection, they must needs have been addressed to some certain, *specific* person or persons in the audience.

[fol. 25-8] The Court characterizes the speech of defendant as follows: "As defendant continued with his opprobrious, abusive and insulting stories . . . It is respectfully suggested that even "opprobrious, abusive and insulting" language is protected by the Bill of Rights, leaving other remedies aside from denial of the right of free speech, for citizens who consider themselves injured and aggrieved by any such language. It is respectfully submitted that even though the characterization of defendant's language by the Court be admitted to be fair, just, and altogether truthful, still the Court misapprehends the facts and the law when it so acts, merely because of that, in effect, to deny to defendant his inalienable right of free speech. Defendant had the right to comment adversely or otherwise upon subjects of public interest. The speech, taken as a whole, shows that it was a political speech and that the abusive language in it was purely extemporaneous and occasioned by the lawless riot going on outside, while the Court itself in the affirming opinion has described so fairly and so well.

The Court is respectfully asked, as a further reason for granting this petition, to consider the fact that most of what defendant covered in his speech has since become a matter of common public knowledge and that public opinion now has come to react generally more violently against the matters about which defendant complained than he did. Also to consider that, with the changing times, no jury would have even considered bringing in a verdict of guilty against the defendant for anything that he said or did on the evening in question. The nature of the speech that defendant intended to make, and did make, is apparent from the following concluding words of the invitations to the meeting that [fol. 25-9] were sent out (see "Additional Abstract of Record", page 3): "The slogan should be: Christ or Chaos —Christian Nationalism or World Communism—Which?"

Is there any good American today who could discuss this subject calmly and dispassionately and without directing towards those who would subvert our Republic and deprive us of our sacred liberties language that might be considered "opprobrious, abusive and insulting"?

It is respectfully suggested that what has been said above entitled defendant to a rehearing of this cause by this Honorable Court, that he might at long last be rewarded in some measure for having had the courage and patriotism to espouse what in February 1946 was an unpopular cause and

have his good name and reputation cleared of the stigma of this unjust conviction for "disorderly conduct." This last, after all, is his sole reason for appealing this cause at a cost far greater than the nominal fine of $100 that was assessed against him, as he feels, unjustly. The Court is most respectfully urged to grant this rehearing.

Respectfully submitted, Albert W. Dilling; Maximilian J. St. George, Attorneys for Petitioner.

Albert W. Dilling of Counsel.

[fol. 26] In Supreme Court of Illinois

[Title omitted]

Order Denying Rehearing—May 13, 1948

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

[fol. 27] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 28] Supreme Court of the United States, October Term, 1948

Arthur Terminiello, Petitioner,

vs.

City of Chicago

Order Extending Time for Filing Petiton for Writ of Certiorari

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 13th, 1948.

Fred M. Vinson, Chief Justice of the United States.

Dated this 11th day of August, 1948.

[fol. 29] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948.

No. 272

ARTHUR TERMINIELLO, Petitioner,

vs.

CITY OF CHICAGO.

ORDER ALLOWING CERTIORARI—Filed December 13, 1948.

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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ALBERT W. DILLING,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Arthur Terminiello respectfully petitions for a writ of certiorari to the Supreme Court of the State of Illinois to review a decree of said Court entered on March 18, 1948 (R. 145), affirming judgments of the Municipal Court of Chicago (entered April 8, 1946; R. 55) and the Illinois Appellate Court for the First District (entered June 25, 1947; R. 133), holding petitioner guilty of disorderly conduct and fining him $100 and $10 costs.

The opinion of the Supreme Court of Illinois is reported in Volume 400 of Illinois Reports at page 23, and that of

the Illinois Appellate Court for the First District in Volume 332 of Illinois Appellate Reports at page 17.

Petitioner filed a "Petition for Rehearing" in the Supreme Court of Illinois in connection with its said judgment on April 12, 1948 (R. 146), which petition was denied on May 13, 1948 (R. 157). On August 10, 1948, petitioner filed herein an application for an extension of time within which to file a petition for a writ of certiorari, the time granted under the Rules of this Court expiring on August 13, 1948. Petitioner was granted a thirty-day extension of time, or until September 13, 1948, for the filing of this petition for a writ of certiorari. This petition is filed on September 11, 1948.

A

Statement of the Matters Involved

This is a "free speech" case, if there ever was one, as the following facts will reveal.

Petitioner was found guilty by a jury in the Municipal Court of Chicago of "disorderly conduct" and fined $100 and $10 costs. Petitioner was charged with having violated Sub-Section 1 of Section 1 of Chapter 193 of the Revised Code of 1939 of the City of Chicago on February 7, 1946, in that he, allegedly, "did make or aid in making an improper noise or diversion tending to a breach of the peace within the limits of the city" (R. 53). A direct appeal was taken to the Supreme Court of Illinois on the grounds that to prosecute petitioner under the ordinance in question—the so-called "disorderly conduct" ordinance of the City of Chicago—*for making a speech* was in violation of the First Amendment to the Constitution of the United States, as well as Article II, Section 4, of the Constitution of the State of Illinois; that if *the making of a speech* can be construed to be "disorderly conduct" under said ordi-

nance, then said ordinance, or at least such application of it; is unconstitutional; and, further, that to attempt to charge a violation of said ordinance by *the making of a speech* is in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

The cause was transferred to the Illinois Appellate Court for the First District, because, it was alleged, "no constitutional question" was "presented *so as to confer jurisdiction*" (Emphasis supplied) on the Illinois Supreme Court (*City of Chicago* v. *Terminiello*, 396 Ill. 41). It should be noted that the cause was transferred *not because a constitutional question was not involved*, but because the constitutional question involved, and properly raised in the trial court, *had not been so presented* to the Illinois Supreme Court (to-wit, accompanied by a certificate of the trial Judge that a constitutional question was involved) *as to confer jurisdiction* upon that Court.

Subsequently, the Illinois Appellate Court for the First District affirmed (*City of Chicago* v. *Terminiello*, 332 Ill. App. 17) in a majority opinion (R. 1 to 19). But a long, vigorous, scholarly dissent was filed by Presiding Judge Niemeyer (R. 19 to 30).

Petitioner then filed a petition for leave to appeal in the Supreme Court of Illinois (R. 1), and it was allowed (R. 134). On March 18, 1948, the Illinois Supreme Court, acting upon written briefs supplemented by oral argument, affirmed (*City of Chicago* v. *Terminiello*, 400 Ill. 23; R. 145). Petitioner filed a petition for rehearing in the Supreme Court of Illinois (R. 146) on April 12, 1948; said petition was denied on May 13, 1948.

This Court granted petitioner a thirty-day extension, or until September 13, 1948, within which to file this petition for a writ of certiorari herein. This petition is filed on September 11, 1948.

B

Jurisdiction

The jurisdiction of this Court is invoked under Sections 1257 and 2106 of New Title 28, the Chapter entitled "Judiciary and Judicial Procedure", of the United States Code, approved June 25, 1948, and effective September 1, 1948. The decree of the Supreme Court of Illinois to be reviewed was filed on March 18, 1948 (R. 145). Petitioner filed a petition for rehearing on April 12, 1948 (R. 146); it was denied on May 13, 1948 (R. 157). This petition for a writ of certiorari is filed within the thirty-day extension of time granted by this Court, within which to file the same.

Raising of Constitutional Question in Municipal Court of Chicago

On March 29, 1946, during the trial of this cause in the Municipal Court of Chicago, the following proceedings took place (R. 84):

> "Mr. Pantelis" (one of counsel for the City of Chicago): The City will therefore rest.
>
> "And thereupon, the plaintiff rested its case.
>
> "Mr. St. George" (one of counsel for petitioner): "At the end of all the testimony for the plaintiff in the case, the defendant moves to exclude all testimony and moves for a directed verdict, that the jury find the defendant not guilty. *The basis is the first amendment to the United States Constitution:* Father Terminiello had a right to say *what he said and what he said was protected by the first amendment to the Constitution*, that the charge in this case, namely, a diversion tending to a breach of the peace, *if it is constitutional under the first amendment, could not prohibit free speech or tend to prohibit free speech; otherwise it would be unconstitutional.*" (Emphasis added.)
>
> "The Court: Motion for directed verdict overruled."

On April 2, 1946, the following proceedings were had during the trial of this cause in said Court (R. 126):

"The jury was excused until 9:30, April 3, 1946.

"Mr. St. George: I just want to make a motion. May it please the Court, at the close of all the testimony in the case, both for the plaintiff and defendant, I move for a directed verdict for the defendant *on the ground that the charge as construed in connection with the speech alleged, which is the subject of arrest, would be in contravention of the 14th Amendment, the 'due process' clause, and further, that to charge this defendant with committing a misdemeanor because he gave the speech in question is a contravention of the First Amendment to the Constitution.*"

Mr. St. George's motion was overruled by the Court. The following appears in the Record (R. 126), under date of April 3, 1946:

"Proceedings April 3, 1946. Instructions offered by plaintiff and refused by the Court.

"Mr. St. George objected to the refusal of the Court to give the following instructions for defendant.

"

"

"

"The Court instructs the jury that the right of free speech is a national right, federally guaranteed, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. And you are instructed to weigh carefully any evidence which would have a tendency to cause you to restrain or deny to the defendant his constitutional right of free speech.

"The court further instructs the jury that they must consider whether there was a clear and present danger flowing from the defendant's speech that said speech would tend to breach the peace. The jury are instructed that no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there

opportunity for discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, and not enforced silence. Only an emergency can justify repression of the constitutional right of free speech."

The following appears in the Record (R. 130) for April 8, 1946:

"Defendant prayed an appeal from said judgment to the Supreme Court of the State of Illinois which was allowed on the defendant filing his appeal bond in the sum of $500.00 instanter, bill of exceptions to be filed in sixty days."

Raising of Constitutional Question in Other Courts

Petitioner filed an extensive "Brief and Argument" in the Supreme Court of Illinois, in connection with the attempted "direct appeal." The cause was transferred to the Illinois Appellate Court for the First District (R. 133) where it was considered on the basis of the briefs of the parties theretofore filed in the Supreme Court of Illinois and oral argument. The basis for the appeal is stated in said brief, as follows: "That to prosecute defendant" (petitioner herein) "under the ordinance in question for making a speech was in violation of the First Amendment to the Constitution of the United States as well as the Constitution of the state of Illinois, Article II, paragraph 4, and that if the making of a speech can be construed to be disorderly conduct under said ordinance, then said ordinance is unconstitutional and further that to attempt to charge a violation of said ordinance by the making of a speech is in violation of the due process clause of the 14th Amendment to the Constitution of the United States."

Said brief, under the sub-title "The nature of the pleadings", contained the following:

"At the end of all the evidence for the City defendant moved to exclude all the testimony and for a directed verdict that the jury find the defendant not guilty on the grounds that defendant's speech was protected by the First Amendment to the Constitution, that otherwise the ordinance in question was unconstitutional (Abst. 44). And at the end of all testimony in the case, both for plaintiff and defendant, appellant renewed said motion for a directed verdict on the same grounds and for the further reason that the charge would be in contravention of the due process clause of the 14th Amendment to the Constitution (Abst. 102). Both of these motions were overruled."

Said brief also contained the following, under the heading "Errors Relied on for Reversal":

"(3) The speech of defendant was not a violation of the ordinance in question and was protected by the First Amendment to the Constitution of the United States and the Constitution of the State of Illinois, Article II, paragraph 4.

"(4) To charge a violation of said ordinance is in contravention of the due process clause of the 14th Amendment to the Constitution of the United States and of the Constitution of the State of Illinois.

"(5) The court improperly instructed the jury and also refused to give proper instructions requested by defendant."

These same questions were raised also in the body of the brief, with extensive argument. The following cases, among others, were cited: *Stromberg v. California*, 283 U. S. 359; *Near v. Minnesota*, 283 U. S. 697; *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Connecticut*, 310 U. S. 296; *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287; *Murdock v. Pennsylvania*, 319 U. S. 105; *W. Va. Board of Education v. Barnette*, 319 U. S. 624; *Thomas v. Collins*, 323 U. S. 516; and *Chaplinsky v. New Hampshire*, 315 U. S. 568.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First and the Fourteenth Amendments to the Constitution of the United States and Section 4 of Article II (part of the so-called "Bill of Rights") of the Constitution of the State of Illinois.

The statutory provision involved is Sub-Section 1 of Section 1 of Chapter 193 of the Revised Code of 1939 of the City of Chicago, the so-called "Disorderly Conduct Ordinance" of the City of Chicago.

For the convenience of the Court, the constitutional and statutory provisions are set forth in "Appendix A" attached to this petition.

Questions Presented

Whether the construction of a so-called "Disorderly Conduct Ordinance" may be so perverted and distorted by Courts as to deprive one of the constitutional protection afforded by the First and Fourteenth Amendments to the Constitution of the United States and by Section 4 of Article II, part of the so-called "Bill of Rights", of the Constitution of the State of Illinois. Also, whether the judgments of the Supreme Court of Illinois, the Illinois Appellate Court for the First District, and the Municipal Court of Chicago, herein, are not directly in conflict with and repugnant to the law of the land, as laid down by this Court in its prior decisions.

E.

Reasons Relied On for the Allowance of the Writ

(1) Petitioner is entitled to a reversal of the judgments of the lower Courts, because said judgments are repugnant to prior decisions of this Court relating to "free speech" and "free assembly".

Among the cases relied upon by petitioner to sustain this view are:

Thornhill v. Alabama, 310 U. S. 88;

Cantwell v. Connecticut, 310 U. S. 296;

Lovell v. Pennsylvania (City of Jeannette), 319 U. S. 105;

West Virginia State Board of Education v. *Barnette*, 319 U. S. 624.

(2) The decisions of the lower Courts should be reversed, also, because, if allowed to stand, the conviction of petitioner would constitute a "previous restraint" upon the right of all citizens of the City of Chicago to the "free speech" and "free assembly" constitutionally guaranteed to them. Such "previous restraints" have been passed upon by this Court and *ruled out* in no uncertain terms.

The principal case relied upon in this connection is:

Near v. Minnesota, 283 U. S. 697.

The case of *Thomas v. Collins*, 323 U. S. 516, is also cited.

(3) With all due respect to the learned Jurists who have held otherwise, there was no "breach of the peace" inside of the hall wherein petitioner spoke on the evening of February 7, 1946. This statement is fully supported by the Presiding Judge of the Illinois Appellate Court for the First District in his very able and learned dissent, which evidences the highest degree of discernment (R. 19 to 30). The speech

of petitioner, therefore, must be carefully examined to see if it, or any part of it, created a "clear and present danger" that a "breach of the peace" might result because of what was said. Such a "clear and present danger", or degree of imminence, is absolutely essential, under prior decisions of this Court, if petitioner's conviction is to be permitted to stand.

The Case of *Cantwell* v. *Connecticut*, *supra*, at page 311, contains the following in this connection:

> "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define specific conduct as constituting *a clear and present danger* to a substantial interest of the State, the petitioner's communications *considered in the light of the constitutional guarantees*, raised no such *clear and present menace* to public peace and order as to render him liable to conviction of the common law offense in question." (Emphasis supplied.)

As this Court will recall, in the *Cantwell case*, a member of the religious sect known as "Jehovah's Witnesses" stopped two persons on a public street in the City of New Haven and asked for and received permission to play for them a phonograph record. The record was entitled "Enemies" and it attacked the Roman Catholic Church and religion in very vicious and vitriolic terms. It so happened that the two men were Catholics.

The *Cantwell case* presents the best answer to respondent in the case at bar. If what Cantwell did was not of such a nature as to create a "clear and present danger" that the peace would be breached (and this Court has held that it was not), it is childish to contend that anything contained in petitioner's speech was of such a nature. Cantwell's affront was to two specific persons who were of the Roman Catholic faith; this, obviously, made them most susceptible

to insult by the playing of the phonograph record in question. Petitioner, on the other hand, simply made a general speech to an audience numbering about 800 persons. No part of his speech was directed to any specific person.

Thomas v. *Collins*, *supra*, and *Bridges* v. *California*, 314 U. S. 252, are two other cases that speak authoritatively with regard to the "clear and present danger" doctrine.

Petitioner might go on to cite many other cases in which the views of this Court as to the necessity for existence of a "clear and present danger" are similarly expressed. To do so, he feels, would be to insult the intelligence of the Court and to transgress unduly upon its time. There is perhaps no other single point involved in this cause that is so generally recognized and conceded by the Judges of all other Courts in the United States and so generally known to all lawyers worthy of the name and profession, no matter how limited their practice may be.

Conclusion

The conviction of petitioner *for making a speech*, as he thought, at a private meeting, in pursuance of his right of "free speech" and "free assembly", is repugnant to the law of the land as laid down by this Honorable Court in its prior decisions, as are also the affirmances of that conviction by the Illinois Appellate Court for the First District and the Supreme Court of Illinois. The proceedings in these lower Courts of the State of Illinois resulting in the wrongful conviction of petitioner should be reviewed by this Court.

Wherefore, Your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Illinois, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Supreme Court of Illinois be reversed by this

Court; and that he may be granted such other and further relief as to this Court may seem meet and proper.

Respectfully submitted,

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(S.) ALBERT W. DILLING,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

I

Preliminary Statement

A statement of the matters involved (including the action taken in the lower Courts), jurisdiction, constitutional and statutory provisions involved, the questions presented, and reasons relied upon for the allowance of the writ appear in the "Petition for a Writ of Certiorari" herein and in the interest of brevity are incorporated here by reference.

II.

Summary of Argument

Introductory Statement. Petitioner begins his "Argument" with this statement, in order that this Court may determine the issues herein and reach its decision as to the granting of the writ prayed for fully informed about the most unusual conditions that prevailed in the vicinity of, and inside of, the hall at the time petitioner exercised his

right of free speech by making the speech involved in this cause. No description of those conditions could be more graphic, or accurate, than that which appears in the majority opinion of the Illinois Appellate Court for the First District and which is quoted in full in the argument.

So far as petitioner's speech and this cause are concerned, it does not matter whether the meeting in question was *public* or *private*.

No "breach of the peace" actually took place inside of the hall.

There was nothing in petitioner's speech that *tended to cause any breach of the peace*. Quotation from dissenting opinion of Presiding Judge in Illinois Appellate Court, with cases, cited in support of this contention.

Point 1. Judgments in lower Courts are repugnant to prior decisions of this Court. They should be reversed.

Petitioner's speech was entitled to constitutional protection. Nothing in it falls within any exception denying "free speech" protection. For instance, *Stromberg* v. *California*, 283 U. S. 359, Mr. Justice Holmes' famous exception, or *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

Lower Court judgments are repugnant to:

Thornhill v. *Alabama*, 310 U. S. 88. Opinion by Mr. Justice Murphy quoted extensively.

Cantwell v. *Connecticut*, 310 U. S. 296. Opinion by Mr. Justice Roberts quoted at length.

Murdock v. *Pennsylvania (City of Jeannette)*, 319 U. S. 105. Extensive quotations from opinion by Mr. Justice Douglas.

West Virginia State Board of Education v. *Barnette*, 319 U. S. 624, 639, also cited.

Lower Court judgments, if allowed to stand, present grave threat to "freedom of speech" and "freedom of assembly" not only in the City of Chicago but in the entire Country.

Point 2. Petitioner's conviction constitutes a "previous restraint" upon the right of all citizens to "free speech" and "free assembly".

Case of *Near* v. *Minnesota*, 283 U. S. 697, cited, with extensive quotations from opinion by Mr. Chief Justice Hughes.

Thomas v. *Collins*, 323 U. S. 516, also cited. Quotations from opinion by Mr. Justice Rutledge set forth.

Point 3. There was no "breach of the peace" inside of the hall. This contention supported in dissenting opinion in Illinois Appellate Court. Attention of the Court directed to this again.

Also, no part of petitioner's speech presented "a clear and present danger" that any substantive evil would result because of what was said. Such "a clear and present danger" is essential, if petitioner's conviction is to stand.

Cantwell v. *Connecticut*, *supra*, cited again to support "clear and present danger" doctrine, also *Thomas* v. *Collins*, *supra*. *Bridges* v. *California*, 314 U. S. 252, also cited.

Conclusion. No curtailment of petitioner's "free speech" is justified. This Court has wide discretion in considering "free speech" question. Quotation from opinion by Mr. Justice Frankfurter in *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 293, cited in support. Court urged to review lower Court judgments, to the end that petitioner's wrongful conviction may be set aside.

III

Argument

Introductory Statement

Some points were raised by petitioner in the Illinois Appellate Court for the First District and the Supreme Court of Illinois on which rulings adverse to him were made,

notably that as to whether the meeting at which he spoke was a "public" or a "private" meeting. So far as these matters and this cause are concerned, the judgments of the lower Courts are final and there would be no point in discussing them in this brief. But petitioner does feel that this Court should be fully informed as to conditions that prevailed that evening around the building in which petitioner spoke and in the hall itself, as revealed by the record, for it is felt that this Court will agree, unanimously, that petitioner, under the circumstances that did exist, exercised and exhibited remarkable self-restraint in what he said and also in failing to take, and recommending that those in the audience take, direct action of some kind against the real lawbreakers on the outside of the hall.

In that regard, the majority opinion of the Illinois Appellate Court for the First District contains the following (R. 6 to 8):

> "From the testimony of all of the witnesses for defendant" (petitioner herein), "we find proof of the following facts; that around the hour of 6:30 P. M. of the day of the meeting, a crowd gathered in front of the building, and a picket line was formed by those in apparent protest to the appearance of the defendant and the holding of such a meeting; that the size of the picket line was described variously from 250 to 500 in number, composed of men, women and young people. It was stated by some of the witnesses that the size of the crowd gathered in front of the building was around 1500 in number. This crowd and the picket line, hereinafter detailed, were there before the start of the meeting. About 200 to 300 people who had tickets for admission could not get in because the hall was filled. Some who had tickets and who those in charge of the door tried to keep out, succeeded in getting in. The witness Karel, for the plaintiff, was one of those. He was known to the attendant at the door. A cordon of police was stationed around the outside of the meeting

hall before the start of the meeting and 6 or 8 police officers, some in uniform and others not, were stationed within the hall at the front and rear entrances. The picket line carried banners with inscriptions condemnatory of the meeting, and it was so formed as to obstruct and interfere with the free access to the meeting by those entitled to enter. *The crowd around the building was a surging, howling mob, hurling epithets at those seeking to get into the meeting.* Groups who came together for the meeting were separated by the mob and were unable to remain together or enter the meeting together. *The pushing and milling crowd tried to tear their clothes off. One young woman's coat was torn off of her. Some had to be assisted into the meeting hall by policemen.* Before the defendant spoke, those inside the hall could hear the loud noises and the yelling and hollering on the outside. *They could hear those on the outside yell, 'Fascist,' 'Hitlers' and other names, curse words like 'damned Fascists.' Bricks were thrown through the window panes before the speaking started and during the speaking. About 28 windows were broken.* The street was black with people on both sides for at least a block either way of the building. *Bottles were thrown, 'stink' bombs and brickbats were hurled against the building. Missiles of all kinds were flying through the air. A group of 40 boys rushed the police stationed on the staircase and knocked some of them down. About 17 of the group were arrested. Throughout the meeting they kept breaking the windows of the meeting hall.* The howling at times drowned out the speaker's voice. *The rear door was being bashed in, the mob trying to crash it in under the speakers' platform. There were a number of attempts to rush the meeting. At one time a brick came through the window, causing the shade to come out, and many people had to jump up. There was a terrific smash, and everybody jumped up. One of the witnesses testified that he heard the crowd hollering, 'Hang Smith, kill Smith,' and making a chanting noise. Still another witness for the defendant testified that you could not stand the stench-bomb odor; that the*

windows were being smashed throughout the time the defendant spoke." (Emphasis supplied.)

The dissenting opinion of the Presiding Judge contains the following (R. 25):

> "Defendant spoke when the building was surrounded *by a belligerent, noisy mob*, at least as large as the audience in the hall, *seeking by mob violence and threats to deny to those in the hall the constitutional right of peaceable assembly and freedom of speech.*" (Emphasis supplied.)

And it will interest this Court to note that it also contains the following (R. 29):

> "There is nothing in the evidence to indicate that the defendant's attitude, bearing or manner of delivery of his speech was bellicose, belligerent, truculent, challenging or intimidating. His training had been that of a pulpit orator. In parts of his speech he impressed upon his hearers the Christian duty to love the people of all races, limiting his condemnation to the criminal element in the races, and in closing he warned the audience to avoid any controversy with the mob outside and advised them not to stop and argue."

The majority opinion in the Illinois Appellate Court for the First District holds that the meeting at which petitioner spoke was a "public" meeting. The vigorous dissent filed by the Presiding Judge holds that it was a "private" meeting. Petitioner submits that it makes no difference, so far as the issues to be determined by this Court are concerned, whether the meeting was in fact *public* or *private*. The Supreme Court of Illinois sustained the contention of the Appellate Court majority. It is, however, important for this Court to weigh the facts and examine the Record, to see if a "breach of the peace" actually took place inside of the hall while petitioner was speaking. As to that, the fol-

lowing from the dissenting opinion of the Presiding Judge in the Illinois Appellate Court is the most enlightening (R. 27):

> "It" (petitioner's speech) "did not cause or tend to cause a breach of the peace. The demonstrations of the audience, with the possible exception of the man who may have called defendant" (petitioner herein) "a liar, were in hearty approval of what defendant said. One witness for defendant says that the epithet 'God damned liar' was uttered when defendant was speaking. Two witnesses for defendant say that it was applied when Smith was speaking. Karel, for plaintiff, heard it but does not state who was speaking at the time. Latimer said that a man was ejected from the hall when Smith or defendant was speaking—he did not recall which. Had the episode occurred at a public meeting, *the man calling the speaker a liar, and not the speaker, would have been guilty of breach of peace.* No one in the hall was threatened, molested or attacked." (Emphasis supplied.)

In the same connection, the following from the same dissenting opinion is also of interest (R. 23):

> "If we accept the majority opinion holding that the meeting was public, it becomes necessary to determine when epithets, abusive and insulting language constitute a breach of the peace. It is universally held that such language does not constitute a breach of the peace unless it tends to incite immediate violence. *People v. Most*, 171 N. Y. 423, 427; *St. Louis v. Slupsky*, 254 Mo. 309, 318; *State v. Steger*, 94 W. Va. 576, 579. In *Ware v. Loveridge*, 75 Mich. 488, 492, the Court said: 'There are, in some of the definitions, references to language tending to provoke a breach of the peace, and relator's claim is based on this. But the authorities have very plainly held that this covers nothing that is not meant and adapted to bring about violence directly. It is laid down, very positively, that insulting and abusive language does not come within the rule, but it must be

threats of immediate violence, or challenges to fight, or incitements to immediate personal violence or mischief.' In Annotated Cases 1917 C (note p. 889) the author says: 'But it seems that at common law language which was not threatening but merely abusive, vulgar or defamatory, did not constitute a breach of the peace, unless it was of a nature designed to bring about an altercation.' In *Cantwell v. Connecticut*, 310 U. S. 296, 309, cited in the majority opinion, the court, in harmony with the foregoing rule, said: 'One may, however, be guilty of the offense (common law breach of the peace) if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, *the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer.*' (Italics ours.)"

It can at least be said, and the Record will bear out the statement, that the meeting was intended to be a *private* one. It can also be said that there was nothing in petitioner's speech that even tended to cause any breach of the peace inside of the hall, much less caused any such breach. The speech was merely an expression of petitioner's views and opinions, perhaps colored somewhat in spots by the unusual conditions that prevailed both outside and inside of the hall while he spoke, as hereinabove related. It was not a *good speech*, either from the standpoint of structure or contents. But he had a right to make it; it came within the purview of his right of "free speech." Therefore, his conviction of "disorderly conduct" in the Municipal Court of Chicago *for making the speech* was wrongful and illegal, as are also the affirmances of that conviction by the Illinois Appellate Court for the First District and the Supreme Court of Illinois. These wrongful, illegal judgments should be reviewed by this Court and in the interests of justice and

for the protection of those inalienable rights of "free speech" and "free assembly" that this Court has so repeatedly upheld in no uncertain terms, they should be reversed forthwith.

Point I

Petitioner is entitled to a reversal of the judgments of the lower Courts, because said judgments are repugnant to prior decisions of this Court relating to "free speech" and "free assembly".

Petitioner's speech was protected by the First Amendment to the Constitution of the United States and by Paragraph 4 of Article II of the Constitution of the State of Illinois. To charge that *by making a speech* he transgressed the so-called "disorderly conduct ordinance" of the City of Chicago is a violation of both the Federal and State guarantees of "freedom of speech" and also of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner's wrongful conviction in this cause is repugnant to the prior decisions of this Court affecting "free speech" and "free assembly." It must be set aside, if these constitutional guarantees mean anything today and if these prior decisions are to be effective so far as petitioner and this cause are concerned.

It is recognized that the right of free speech is not absolute. Petitioner, for example, has no quarrel with the following from the opinion of this Court in *Stromberg v. California*, 283 U. S. 359, 368:

> "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech. *Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382. The right is not an absolute one, and the State in

the exercise of its police power may punish the abuse of this freedom. There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions."

Nor has he any quarrel with the well-known exception propounded by the late Mr. Justice Holmes that protection afforded by the Constitution would not permit a person to go into a crowded theatre and yell "Fire!"

But he respectfully submits that there is nothing in his speech (R. 68 to 79) that would cause it, or any part of it, to fall within these exceptions.

Nor does his speech, or any part of it, fall within the exception envisioned by this Court in *Chaplinsky v. New Hampshire*, 315 U. S. 568. In that case, Chaplinsky was held to have violated a certain New Hampshire statute when he called a *specific person* a "damned racketeer" and a "damned Fascist". The statute in question was held to be "a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace", and the words used by Chaplinsky were held to be "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." In the case at bar, petitioner addressed no remarks whatsoever to any specific person, and, certainly, he used no epithets whatsoever, as the Record will show.

Petitioner's conviction in this cause is repugnant to the decision of this Court in *Thornhill v. Alabama*, 310 U. S. 88. The opinion in that case, by Mr. Justice Murphy, contains the following (Page 95):

"*First.* The freedom of speech and of the press, which are secured by the First Amendment against

abridgement by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a State.

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153n. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider v. State*, 308 U. S. 147, 161, 162."

And at page 97:

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near v. Minnesota*, 283 U. S. 697, 713. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for the failure to procure it.

Lovell v. Griffin, 303 U. S. 444; *Hague* v. *C.I.O.*, 307 U. S. 496. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. *The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview.*" (Emphasis supplied.)

That is exactly the situation we have in the case at bar. The prosecuting officials of the City of Chicago seek to deprive petitioner of his freedom of speech by a perverted, illegal use of a "disorderly conduct ordinance". If they are permitted to succeed, further abuses are not hard to envision. It may act to end the "two-party", or "multi-party", system under which this Country has prospered and become great. It is easy to picture Democrats, for instance, seeking, and obtaining, the arrest and conviction of their Republican opponents because of offensive sentiments expressed at some rival political rally, an abuse of the ordinance and of the rights of free speech and free assembly no more flagrant than that in the case at bar. If the legal precedent set in this case thus far is permitted to stand as part of the law of the land, picture the use of it that might be made by the "Dixiecrats" against their "Progressive" opponents—something far more effective and dangerous than the mere throwing of eggs and tomatoes, to which Mr. Henry A. Wallace has recently been subjected.

On page 101 of the *Thornhill* case the Court says:

> "*Fourth.* We think that Section 3448" (the statute involved) "is invalid on its face."

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

Concluding, on page 104, the Court says:

"Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

The case of *Cantwell v. Connecticut*, 310 U. S. 296, from which the Presiding Judge of the Illinois Appellate Court quoted briefly, as noted above, is exactly in point with the case at bar. The facts concerning said case are briefly set forth in the petition for a writ of certiorari herein (page 5 hereof); in the interest of brevity, they are incorporated in this brief by reference. The opinion, by Mr. Justice Roberts, contains the following, at page 303:

"*First.* We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment." (Citing: "*Schneider* v. *State*, 308 U. S. 147, 160".) "The First Amendment declares that Congress shall make no law respecting an establishment of religion or pro-

hibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the state as incompetent as Congress to enact such laws."

The same applies with equal force to laws abridging free speech, free press, and free assembly—the other rights protected by the First Amendment. The *Cantwell case*, of course, involves free speech also, for ideas were transmitted as clearly by the playing of the phonograph record as if they had been spoken by Cantwell.

The opinion contains the following at page 308:

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect." (Petitioner's speech, as the Record verifies, contains no "incitement to riot" or exhortation to attack anyone. On the other hand, as already noted above, he did "exhort" his hearers to remain peaceful and not engage in any quarrel or argument even with the lawless rioters outside the hall.) "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." (This is exactly the situation, so far as respondent is concerned, in the case at bar.) "Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its applica-

tion." (Again the situation, so far as the case at bar is concerned.)

"

"Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, *in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer.*"

It is respectfully submitted that there is absolutely nothing of that nature in the speech of petitioner that is claimed by respondent to have "created a diversion tending to a breach of the peace", and, furthermore, that there was nothing "personal" in anything petitioner said, his expressions of political opinion and belief being addressed generally to an audience numbering hundreds of people.

In *Murdock* v. *Pennsylvania (City of Jeannette)*, 319 U. S. 105, other members of "Jehovah's Witnesses" were accused of having violated a City Ordinance by not having first secured a license before going about from door to door, distributing and soliciting people to purchase certain literature. In that case, also, those accused carried a phonograph on which they played records expounding their views on religion. The opinion in that case contains the following (page 108):

"The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .' It could

hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional, yet the license tax imposed by this ordinance is, in substance, just that."

And at page 113:

"The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, *supra* (308 U. S. 147); *Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Largent* v. *Texas*, 318 U. S. 418; *Jamison* v. *Texas*, *supra* (318 U. S. 413)."

So, also, is the attempt by respondent in the case at bar to make expression of political opinion and belief the offense of "disorderly conduct" a bold sally into the field of censorship, and it, too, should be struck down with equal emphasis and certainty. At page 115, the opinion contains the following:

"The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality of treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position . . .

"Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative; abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See *Douglas* v. *Jeannette*, concurring opinion, post, p. 166. But those considerations are no justification for the license tax which the ordinance imposes."

Respondent, in the trial court, attacked petitioner's speech viciously and sought to impute to it abusive and objectionable matter that it does not contain. This may have been effective with the jury in bringing about petitioner's wrongful conviction. But it cannot alter the wording or nature of the speech, which is contained in the record (R. 68 to 79) substantially as it was delivered. And even if it had been as abusive and objectionable as respondent sought to make it appear, under the decision in the *Murdock case*, just referred to, that would not justify depriving petitioner of his right of free speech.

No stronger words upholding the constitutional rights protected by the First Amendment are to be found in any decision than those used by Mr. Justice Douglas at the close of his opinion in the *Murdock case*, as follows:

> "*Plainly a community may not suppress, or the state Tax, the dissemination of views because they are unpopular, annoying or distasteful.*" (Emphasis supplied.) "If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."

In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639, this Court held the following:

> "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. *They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.*" (Emphasis supplied.)

Point 2

The decisions of the lower Courts should be reversed because, if allowed to stand, the conviction of petitioner would constitute a "previous restraint" upon the right of all citizens of the City of Chicago to the "free speech" and "free assembly" constitutionally guaranteed to them.

"Previous restraints" upon the rights protected by the First Amendment have been passed upon by this Court repeatedly and *ruled out* in no uncertain terms.

The case of *Near v. Minnesota*, 283 U. S. 697, is such an important case, involving the freedoms guaranteed by the First and Fourteenth Amendments to the United States Constitution, that it will be discussed and quoted from at greater length than might seem necessary. Though the freedom involved is "freedom of the press," the case is equally applicable to the case at bar, in which "freedom of speech" is primarily involved. It should be clear that "freedom of assembly" and the right to petition the government for a redress of grievances are likewise threatened in the case at bar.

The newspaper sought to be restrained and enjoined in the *Near* case, "The Saturday Press", contained "matter attacking certain Minneapolis newspapers, certain Minnesota politicians and 'the Jewish Race'," contrary to the provisions of a certain statute. The articles "charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." An attempt was made to assassinate one Guilford, one of the owners of "The Saturday Press." On page 707 Mr. Chief Justice Hughes said:

> "It is no longer open to doubt that the liberty of the press, *and of speech*, is within the liberty safeguarded

lly the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York*, 268 U. S. 652, 666; *Whitney v. California*, 274 U. S. 357, 362, 373; *Fiske v. Kansas*, 274 U. S. 380, 382; *Stromberg v. California*, ante, p. 359."

According to the State Court, as reported in the opinion on page 709, the statute was "aimed at the distribution of scandalous matter as 'detrimental to public morals and to the general welfare', tending 'to disturb the peace of the community' and 'to provoke assaults and the commission of crime.'"

On page 717 of that opinion this Court quotes Madison, as follows:

> "'Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. . . .
>
> "'Had "Sedition Acts", forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might, they not, possibly, be miserable colonies, groaning under a foreign yoke?'"

And then this Court proceeds:

> "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to

debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraint has been approved in many decisions under the provisions of state constitutions." (Quoting numerous decisions.)

"Previous restraint" on freedom of speech likewise violates a constitutional right. If the City Ordinance of the City of Chicago, involved in the case at bar, were to be upheld and sought to be enforced, it would operate as a "previous restraint" on all speakers in the City of Chicago who might desire to exercise their right of free speech and in so doing criticize crime and corruption on the part of public officials or express views unpopular to well-organized minorities seeking to suppress criticism and impose their arbitrary will on the people of this country. Surely, if the conviction and fine imposed upon petitioner in the lower court is upheld, it will act as a "previous restraint" upon further speaking on his part in the City of Chicago, and thus, in utter disregard of both the State and Federal Constitutions, deprive him of his freedom of speech.

This Court then goes on to say, at Page 721:

"Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication: 'To prohibit the intent to excite those unfavorable sentiments against those who

administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct.'" (From: Report on Virginia Resolutions, Madison's Works, Vol. IV, page 549.) "There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung* v. *Nolan*, 89 N. J. Eq. 387, 388; 105 Atl. 72: 'If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.' The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words."

Judgment was reversed, in a "5 to 4" decision, and it is interesting to note that though the articles complained of attacked Jews far more so than anything respondent sought to "read into" petitioner's speech, as may be seen by reference to said articles, still the late Mr. Justice Brandeis, perhaps the most distinguished American of Jewish faith, held with the majority in reversing the lower Court and in upholding the right of freedom of speech and of the press.

In *Thomas* v. *Collins*, 323 U. S. 516, a Texas statute required labor organizers to register with and procure an

organizer's card from a designated State official before soliciting membership in labor unions. While a State court order restraining Thomas from violating the statute was in effect, he made a speech before an assemblage of workers. At the end of his speech, he urged his hearers, generally, to join a union, and also asked an individual by name to become a member. He was sentenced to imprisonment and fined for contempt of court.

In the opinion written by Mr. Justice Rutledge he says (518):

> "For reasons to be stated we think the statute as it was applied in this case imposed previous restraint upon appellant's right of free speech and free assembly and the judgment must be reversed."

So, in the case at bar, it is not necessarily the city ordinance in question that is unconstitutional but the application sought to be made of it, to deny to petitioner his rights of free speech and free assembly. There was of course no "previous restraint" so far as petitioner's speech of February 7, 1946, was concerned, but his wrongful conviction, if upheld by this Court, will most certainly operate as a "previous restraint" upon future rights of free speech and free assembly, not only those of petitioner but of many others.

Mr. Justice Rutledge concluded the opinion with this eloquent paragraph (page 543):

> "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be

no more plain than when they are imposed on the most basic right of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty. Judgment reversed."

POINT 3

With all due respect to the learned Jurists who have held otherwise, there was no "breach of the peace" inside of the hall wherein petitioner spoke on the evening of February 7, 1946. This statement is fully supported by the Presiding Judge of the Illinois Appellate Court for the First District in his very able and learned dissent, which evidences the highest degree of discernment (R. 19 to 30). The speech of petitioner, therefore, must be carefully examined to see if it, or any part of it, created a "clear and present danger" that a "breach of the peace" might result because of what was said. Such a "clear and present danger," or degree of imminence, is absolutely essential, under prior decisions of this Court, if petitioner's conviction is to stand.

The "Introductory Statement" that appears at the beginning of this argument contains the pertinent quotations from the dissenting opinion mentioned above. For the sake of brevity, it is included at this point only by reference. The Court is respectfully urged to give the facts contained therein careful consideration.

The opinion in the case of *Cantwell v. Connecticut, supra,* at page 311, contains the following concerning the "clear and present danger" doctrine:

> "Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define specific conduct as constituting *a clear and present danger* to a substantial interest of the State, the petitioner's communication *considered in the light of the constitutional guarantees*, raised no such *clear and present menace* to public peace and order as to render him liable to conviction of

the common law offense in question". (Emphasis supplied).

The *Cantwell case* presents the best answer to respondent in the case at bar. If what Cantwell did was not of such a nature as to create a "clear and present danger" that the peace would be breached (and this Court has held that it was not), it is childish to contend that anything contained in petitioner's speech was of such a nature. Cantwell's affront was to two specific persons who were of the Roman Catholic faith; this, obviously, made them most susceptible to insult by the playing of the phonograph record in question. Petitioner, on the other hand, simply made a general speech to an audience numbering about 800 persons. No part of his speech was directed to any specific person in the audience.

Mr. Justice Rutledge in his learned opinion in the case of *Thomas* v. *Collins, supra*, included the following (page 529):

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Prince* v. *Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions.
>
> "For these reasons any attempt to restrict those liberties must be justified by *clear public interest*, threatened not doubtfully or remotely, but by *clear and present danger*. The rational connection between the remedy to be provided and the evil to be curbed,

which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, *must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly." (Emphasis supplied.)

It is certain that petitioner's speech *endangered no paramount public interest* and *created no clear and present danger* that would justify any limitation upon his freedom of speech or his wrongful conviction, no matter how repulsive and objectionable portions of what he said might be to some persons or groups of persons. What he said, or what it may have been presumed in advance that he might say by his political opponents, could not possibly justify or excuse the lawlessness outside the hall that preceded his speech by a matter of hours and continued during all of the time that he spoke and for a long time thereafter. It was petitioner's unquestioned right to express himself peaceably on matters of current public interest before an audience gathered primarily to hear him. That right must be upheld by this Honorable Court.

In the case of *Bridges* v. *California*, 314 U. S. 252, which is so widely known that it seems unnecessary to set forth any extensive facts pertaining to it, this Court, opinion by Mr. Justice Black, discussed the extent of the substantive evil that must be imminent before any curtailment of free speech or free press is permissible, in the following words (page 262):

"Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restric

tion upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney v. California*, *supra*, 274 U. S. 374, 71 L. Ed. 1105, 47 S. Ct. 641); it must be 'serious' (*id.* 378). And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. Irvington*, 308 U. S. 147, 161, 84 L. Ed. 155, 164, 60 S. Ct. 146.

"What finally emerges from the 'clear and present danger' cases is a working principle that *the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.* Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. *It prohibits any law 'abridging the freedom of speech, or of the press'.* It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (Emphasis supplied.)

The *Bridges case*, of course, involved a contempt proceeding for comments made concerning certain litigation, by Bridges, in a telegram, and by a newspaper in its columns. Primarily, therefore, it concerns "freedom of the press", but, as will be noted, the opinion specifically covers "freedom of speech", as well.

IV

Conclusion

Petitioner feels that the decisions of this Court, as hereinabove set forth, entitle him to have his wrongful conviction for "disorderly conduct" reviewed and set aside. He

respectfully submits that there is nothing in his speech that is involved in this cause that in any way justifies any curtailment of his freedom of speech, no matter how distasteful some parts of it may be to some persons or groups of persons. He glories in the fact that the learned Jurists who grace the Bench of this Court, without exception, have been so liberal in their rulings affecting the rights of free speech as to without question satisfy the philosopher, were he alive today, who said in substance: "I disagree heartily with what he says. But I shall fight to the death, if necessary, to defend his right to say it."

In closing, petitioner urges this Court to resolve any apparent conflict appearing in the Record in his favor, giving him the benefit of any doubt, as it were. He respectfully submits that in so doing the Court would but be exercising its wide discretion once more when considering this perennial "free speech" question, the extent of which discretion may be clearly gathered from the following, which is quoted from the learned opinion of Mr. Justice Frankfurter in *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 293:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

Petitioner respectfully prays that this Court may review the judgments of the lower Courts in this cause, to the end that his wrongful conviction of "disorderly conduct"

for making a speech may ultimately be reversed and set aside.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4 of Article II (known as the "Bill of Rights") of the 1870 Constitution of the State of Illinois provides that:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

Statutory Provisions Involved

Sub-section 1 of Section 1 of Chapter 193 of the Revised Code of 1939 of the City of Chicago provides that:

> "All persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the City . . . , shall

be deemed guilty of *disorderly conduct*, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred, hundred dollars for each offense." (Emphasis added.)

Provisions of United States Code Affording Jurisdiction

Section 1257 of New Title 28, entitled "Judiciary and Judicial Procedure", of the United States Code provides that:

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or statutes of, or Commission held or authority exercised under, the United States."

Section 2106 of said New Title 28 provides that:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

On Writ Of Certiorari To The Supreme Court of Illinois

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

On Writ Of Certiorari To The Supreme Court of Illinois

PETITIONER'S REPLY BRIEF.

Introduction.

Respondent's answering brief seems to have been written for the purpose of beclouding the one and only issue in the case at bar—*free speech*—in the forlorn hope that this Honorable Court might become confused and bemused and,

so have its attention diverted to other matters discussed therein that have no bearing whatsoever upon that one all important issue.

It is only because of a sincere feeling and belief that his wrongful conviction in the case at bar violates the sacred right of *free speech* guaranteed to him by the Constitution that petitioner has appealed from the judgments of the lower Courts, instead of paying the fine of $100 and costs assessed against him (after all, a purely nominal amount as compared to the cost of appealing). No doubt in recognition of the high principle, not the insignificant sum of money, involved, he has been accorded the high privilege, due to the wonderful system of government under which we live in this free America, of appearing before this, the greatest Court of last resort in the World, for review of that conviction, with every hope that this Court will reaffirm in this case what it has so frequently and consistently held concerning the right of *free speech*, reverse the judgments of the lower Courts, and thus, at long last, accord him the justice and relief to which he sincerely feels entitled.

Respondent's answering brief is not an "answer" at all. It is repetitious. In support of its two points, it presents, in part, almost identical arguments, encroaching unduly upon the time of the Court. In reality, it hardly merits a reply. Were petitioner to reply to it fully, sentence for sentence and paragraph for paragraph, he would himself be adding to the confusion which it sets up and at least tend to divert the attention of the Court from the *free speech* issue. This he will not do. He feels that the brief already filed herein amply supports the contention that his wrongful conviction violates his Constitutional right of

free speech and that the judgments of the lower Courts should be reversed.

But he nevertheless deems it appropriate and possibly of help to the Court to comment upon some of the matters covered in respondent's answering brief.

Attempt To Prejudice The Court?

On page 16 of its brief, respondent states, "He" (petitioner) "charged Mrs. Roosevelt with being a Communist (R. 71)."; on page 22, the statement is repeated as follows: "Mrs. Roosevelt is charged with being a Communist (R. 71)."

Reference to page 71 of the Record shows that it was Gerald L. K. Smith, if anyone, and not the petitioner, who charged Mrs. Roosevelt with being a Communist. The petitioner did, it is true, take issue with a statement concerning "the revolution" attributed to Mrs. Roosevelt. This he had a perfect right to do. Mrs. Roosevelt is a public figure who has never been accused of dodging controversial issues and is a newspaper columnist, expressing her views freely in a daily column. As such, she is, of course, subject to criticism. It may well be that Mr. Smith slandered Mrs. Roosevelt by charging her with being a Communist, and that the petitioner did likewise in referring to it in his speech. If so, Mrs. Roosevelt, and nobody else, might properly have filed an action for damages for the slander against one or both. It certainly does not justify depriving petitioner of his right of *free speech*.

But what purpose is served by respondent in thus falsely and repeatedly attributing the charge to petitioner? Can it possibly be for any purpose except to prejudice the Petitioner with this Court?

Petitioner Admittedly "Anti 'New Deal'."

It would be futile to argue that petitioner, in February 1946, was not "anti 'New Deal'". His speech clearly stamps him as such. But he should not, because of that, be deprived of his right of *free speech*. This Country, as we have known it, would soon cease to exist, were citizens to be deprived of the right to criticize the administration in power freely and harshly.

Nowhere is this precise point better stated than by a distinguished member of this Court in his dissent in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, in the following words (Page 301):

> "In determining whether the injunction does deprive petitioners of their constitutional liberties, we cannot and should not lose sight of the nature and importance of the particular liberties that are at stake. And in reaching my conclusion I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."

In *Baumgartner* v. *U. S.*, 322 U. S. 665, another distinguished member of this Court wrote in the majority opinion (Page 673):

> "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

And in the *Schaefmmer Case* (279 U. S. 644), the late Mr. Justice Holmes, dissenting, said (Page 654):

> "... if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

Did Illinois Supreme Court Decision "Dispose Of" Petitioner's Rights?

On page 3 of its brief, respondent states the following: "His" (petitioner's) "claim under the Constitution of the State of Illinois *has been disposed of* by the judgment of the Supreme Court of Illinois (400 Ill. 231)." (Emphasis supplied.) That, of course, is not true.

The opinion in the *Baumgartner* Case, cited above, contains the following, at page 670:

> "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case."

And at page 671, the following:

> "Deference properly due to the findings of a lower court does not preclude the review here of such judgments."

The Fourteenth Amendment to the Constitution (Page 41 of Petitioner's brief) protects a person from action by any State which abridges the rights guaranteed by the First Amendment to the Constitution. The greatest rights of American citizenship are guaranteed by the First Amendment, including *free speech*, the one so clearly involved in

the case at bar. So, certainly, any decision of the Supreme Court of any State affirming a conviction of disorderly conduct against a citizen for *making a speech*, is at once suspect and properly subject to review by this Honorable Court. The sacred right of *free speech* cannot be so lightly *disposed of*, and the adverse decision of the Supreme Court of the State of Illinois, with all due respect to the learned jurists who composed it, did not *dispose of* petitioner's right of *free speech*.

In this connection, it should be noted that respondent, on page 2 of its brief, alludes to "the speech which forms the background for this prosecution".

Professor Zechariah Chafee, Jr. On "Free Speech".

Professor Zechariah Chafee, Jr., of Harvard University Law School, a recognized authority on the subject of "Free Speech", makes the following poignant statement in the introduction to his book "Free Speech in the United States" (1941), at page ix:

> "Unfettered discussion of war aims in 1918 might have produced a better treaty, rallied liberals around President Wilson to carry the United States into the League of Nations, and saved English children from German bombs in 1941. Thus unremitting regard for the First Amendment benefits the nation even more than it protects the individuals who are prosecuted. The real value of freedom of speech is not to the minority that wants to talk, but to the majority that does not want to listen."

On page 4 the following appears:

> "I am not an atheist, but I would not roast one at the stake as in the sixteenth century, or even exclude him from the witness stand as in the nineteenth. Neither am I a pacifist or an anarchist or a Socialist or a Bolshevik. I have no sympathy myself with the views

of most of the men who have been imprisoned since the war began for speaking out." My only interest is to find whether or not the treatment which they have received accords with freedom of speech. That principle may be invoked just as eagerly in future years by conservatives. "Whatever political or economic opinion falls within the scope of the First Amendment ought to be safeguarded from governmental interference by every man who has sworn to uphold the Constitution of the United States, no matter how much he disagrees with those who are entitled to its protection or how lofty the patriotism of those who would whittle away the Bill of Rights into insignificance.

"A friend of Lovejoy, the Abolitionist printer killed in the Alton riots, said at the time:

"We are more specifically called upon to maintain the principles of free discussion in case of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed."

Meeting Itself In No Sense Unlawful.

The opinion of the Supreme Court of the State of Illinois contains the following (R. 142):

"Defendant, self-described as a member of the 'lunatic fringe' by his conduct in scheduling an address in a large auditorium, invited a storm of protest, (fol. 19) which was concentrated in the mob of approximately one thousand persons gathered in the public streets outside the auditorium. Just as he drew his audience into the auditorium, he drew hundreds of his antagonists to the area adjacent to the hall. As related, the explosive situation thus created by defendant resulted in innumerable acts of violence extending over a period of several hours. The air was filled with shouts and noisy chanting, property was destroyed, rocks, brickbats and stench bombs were thrown at the auditorium, and both private individuals and police officers were assaulted. *The meeting was, indeed, a diversion tending to a breach of the peace.*" (Emphasis added.)

With this finding, petitioner respectfully takes issue and suggests that it is unwarranted by the facts in the case as revealed by the Record. He suggests, further, that it would be most unjust and un-American to permit a lawless mob of persons holding opposite views to assemble and riot in an attempt to prevent a meeting and a contemplated speech, and then hold the speaker, who manages to speak despite the mob, responsible for the lawlessness and, under that pretext, hold him guilty of "disorderly conduct." Even the affirming majority opinion of the Illinois Appellate Court for the First District contains the following characterization of the lawless mob (R. 17):

> "The demonstration on the outside of the meeting hall is one we must condemn as un-American and as clear a violation of law as can come to the observation of any court. (fol. 2-24) Many of them were arrested, but the police should have done their full duty by dispersing the mob and suppressing the demonstration."

Professor Chafee, on page 151 of "Free Speech in the United States", makes the following comment on this very point:

> "This breach of the peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self-control and cannot refrain from violence. The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at 'Fruitlands', not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up. A man does not become a criminal because some one else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence.

"Thus all these crimes of injurious words must be kept within very narrow limits if they are not to give excessive opportunities for outlawing heterodox ideas."

On page 160, the following pertinent comment appears:

"Since any gathering of radicals is likely to be attacked, the easiest way to preserve the peace is to forbid and break up such gatherings. Therefore, it may be contended that a meeting which is not otherwise illegal may become so solely because it will excite violent and unlawful opposition." (In footnote at this point, the following appears: "See Dicey, *Law of the Constitution*, chap. vii, 'the Right of Public Meeting' The Salvation Army case is *Beatty v. Gillbanks*, 9 Q. B. D. 308 (1882).")

"This is the doctrine of the long beard case over again. Let us see how it works out with respect to meetings. The Salvation Army holds a service in a public place, knowing that a mock-organization called the Skeleton Army intends to molest it. The Skeleton Army appears, and begins to throw stones. The members of the Salvation Army are arrested by the police for holding an unlawful assembly. Obviously they must be released. Their guilt cannot be determined by the intolerance of wrong-doers. Apart from the question of permits, and special regulation by ordinances and statutes, the police cannot treat a meeting as unlawful simply because it may probably or naturally lead others to attack it. And if a permit is refused on that ground alone, a small number of intolerant men by passing the word around that they intend to start a riot can prevent any kind of meeting, not only of radicals who want a revolution, but of socialists, of moderates like the Committee of '48, of negroes, of novel religious sects, of Freemasons in an anti-masonic community. Indeed, on any such theory a gathering which expressed the sentiment of a majority of law-abiding citizens would become illegal because a small gang of hoodlums threatened to invade the hall. The proper remedy for these emergencies is police protection, to which men are entitled in public places, whether they are there singly or in groups."

A further citation of the *Beatty* Case discussed by Professor Chafee is "2 Law Reports (Col.) 1847, 15 *Cox's Criminal Law Cases* 138". In that case, "Gillbanks" was "superintendent of the constabulary" at Weston-super-Mare, England; "Beatty" was a captain and a leader of the Salvation Army. Beatty and two others were convicted for "unlawfully and tumultuously assembling with others to the disturbance of the public peace." Beatty and many others had assembled and were set upon by the "Skeleton Army"; a group opposed to the Salvation Army.

The opinion, by Mr. Justice Field, contains the following (Page 145):

> "There is no doubt that the appellants did assemble together with others in great numbers, but that alone is insufficient. The assembly must be a 'tumultuous assembly', and 'against the peace' in order to render it an unlawful one . . . But the evidence as set forth in the case shows that, so far from that being the case, the acts and conduct of the appellants caused nothing of the kind, but, on the contrary, that the disturbance that did take place was caused entirely by the unlawful and unjustifiable interference of the Skeleton Army, a body of persons opposed to the religious views of the appellants and the Salvation Army, and that but for the opposition and molestation offered to the Salvationists by these other persons, no disturbances of any kind would have taken place. The appellants were guilty of no offense in their passing through the streets and why should other persons interfere with or molest them? What right had they to do so? If they were doing anything unlawful it was for the magistrates and police, the appointed guardians of law and order, to interpose. The law relating to unlawful assemblies, as laid down in the books and cases, affords no support to the view of the matter for which the learned counsel for the respondent was obliged to con-

tend, viz, *that persons acting lawfully are to be held responsible and punished merely because other persons are thereby induced to act unlawfully and create a disturbance.*" (Emphasis supplied.)

At page 146 the following appears:

> "I hope, and I cannot but think, that when the Skeleton Army, and all other persons who are opposed to the proceedings of the Salvation Army, come to learn, as they surely will learn, that they have no possible right to interfere with or in any way to obstruct the Salvation Army in their lawful and peaceable processions, they will abstain from opposing or disturbing them. It is usual happily in this country for people to respect and obey the law when once declared and understood, and I hope and have no doubt that it will be so in the present case. But, if it should not be so, there is no doubt that the magistrates and police, both at Weston-super-Mare and everywhere else, will understand their duty and not fail to do it efficiently, or hesitate, should the necessity arise, to deal with the Skeleton Army and other disturbers of public peace as they did in the present instance with the appellants, for no one can doubt that the authorities are anxious to do their duty to prevent a disturbance of the public peace."

The decision in the *Beatty* Case was a *precedent decision*. Though, as indicated, it was rendered in 1882, it is still good law. The application of the *Beatty* Case to the case at bar will without doubt be readily apparent to this Honorable Court. The two cases are exactly in point. In the *Beatty* Case, the wrongful conviction was reversed. This Court is respectfully urged to follow the precedent so set and use the *Beatty* Case as the basis, at least in part, for reversal of the wrongful conviction of petitioner in the case at bar.

Petitioner's Characterization Of Mob Justified.

The greatest stress is placed by respondent upon the use by petitioner of the words "scum" and "slimy scum" in his speech (R. 68). The use of these terms must be considered in the light of what was transpiring around the hall while petitioner spoke, and what had transpired before.

Petitioner, it will be noted, said: " . . . I *suppose* there are some of the scum got in by mistake . . . " A little later, he said: "Now, my friends, nothing you hear tonight so far, nothing that I would say can begin to express the contempt I have for that howling mob on the outside. Nothing I can say can express the contempt I have for anyone who would dare to attempt to undermine the freedom of speech and all other freedoms of America. And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake."

The true character of the mob outside, and its lawlessness, is highlighted by its attempt, as related in Petitioner's speech at this point, to stampede the meeting by sending in "firemen with tin hats", presumably in response to a false alarm of fire. It is horrible to contemplate what injury and loss of life might have ensued, had this abortive attempt to "stampede" the capacity audience succeeded.

Petitioner testified (R. 112): "We got there" (that is, to the building in which the meeting was held) "approximately fifteen or twenty minutes past eight. The car stopped at the front entrance. There was a crowd of three or four hundred congregated there shouting and cursing and picketing . . . When we got there the pickets were not marching; they were body to body and covered the side

walk completely, some on the steps *so that we had to form a flying wedge to get through. Police escorted us to the building*, and I noticed four or five others there. (R. 113)

". . . They called us 'God damned Fascists, Nazis, ought to hang the so and so's. When I entered the building I heard the howls of the people outside. . . . The officers threatened that if they broke the door again they would arrest them and every time they opened the door a little to look out something was thrown at the officers, including ice-picks and rocks. . . . A number of times the door was broken, was partly broken through. There were doors open this way and they partly opened and the officers looked out two or three times and each time ice-picks, stones and bottles were thrown at the police at the door . . . I saw a number of windows broken by stones and missiles. I saw the back door being forced open, pushed open. The front door was broken partly open after the doors were closed . . . There were other speakers who spoke before me and before I spoke I heard things happening in the hall and coming from the outside. I saw rocks being thrown through windows and that continued throughout at least the first half of the meeting, probably longer, and again attempts were made to force the front door, rather the front door was forced partly. The howling continued on the outside, cursing could be heard audibly in the hall at times. Police were rushing in and out of the front door protecting the front door, and there was a general commotion, all kinds of noises—all from the outside. Between the time the first speaker spoke and I spoke, stones and bricks were thrown in all the time. I started to speak about 35 or 40 minutes after the meeting started, a little later than nine o'clock."

Under cross-examination, petitioner testified as follows (R. 116):

"My use of the word 'scum' was an extemporaneous part of the speech. *It was due to the fact that my*

own people were spit on and kicked and bruised."
(Emphasis added.)

Respondent, which now hangs its whole case upon the use of the word "scum" by petitioner, objected to the latter's underlined explanation as to why he used the term. For some unaccountable reason, the objection was sustained and, in effect, petitioner was precluded, at the instance of respondent, from explaining and defending his use of the term. It would be the height of injustice to permit respondent to take the advantage that it now seeks to take of this situation.

Through similar objections sustained by the Court, petitioner was precluded from giving the sources of information contained in his speech and also from establishing the truthfulness and authenticity of what he said.

Dictionary Definition of "Scum"

In Webster's *New International Dictionary*, Second Edition, Unabridged, 1944, the word "scum" is defined as "anything vile or worthless; hence vile or worthless persons; a rabble of low people". And the word "rabble" is defined as a "tumultuous crowd of people; a mob."

These definitions well fit the lawless rioters who all but surrounded the West End Woman's Club in Chicago on the evening of February 7, 1946, including those referred to by petitioner "who got in by mistake", despite every possible precaution that was taken to restrict attendance at the meeting and keep it "private". The rioters have been universally designated as a "mob" and a most lawless one at that.

Was petitioner's designation of these rioters, collectively, as "scum" justified and warranted? It is respect-

fully submitted that it was, and the wonder is that petitioner, under all of the circumstances revealed by the Record, did not use far stronger language than he did use. The words "scum" and "slimy scum" would aptly describe any lawless mob seeking, as this one did, to deprive American citizens of their rights of *free speech* and *free assembly*.

Chaplinsky Case Not In Point.

Petitioner feels that what is contained on page 22 of his brief concerning *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, relied upon by respondent, is sufficient to show its inapplicability to the case at bar.

However, he wishes to emphasize that the construction placed upon the New Hampshire statute by the lower Court, which construction was accepted and quoted with approval by this Court, was that no words were forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, *individually*, the remark is addressed; and that the statute prohibits no more than the *face-to-face* words plainly likely to cause a breach of the peace by the addressee. There were no "face-to-face" words in petitioner's speech. There were no persons to whom any remark was addressed "individually". Petitioner's speech was addressed generally to an audience of about 800 persons. What possible application of the *Chaplinsky* case can there be to the case at bar?

Petitioner has no quarrel with what is said in the closing words of the opinion in the *Chaplinsky* case about the appellations "damned racketeer" and "damned Fascist". However, in connection with the latter, it is interesting to note the following from the opinion of a distinguished member of this Court in a later case, *Cafeteria Employees'*

Union v. Angelos, 320 U. S. 293, 295: "That the picketing under review was peaceful is not questioned. And to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."

Petitioner's Speech No "Incitement To Violence".

The Supreme Court of Illinois erroneously held that petitioner's speech "tended to incite the majority of his audience to immediate violence against the angry mob outside". The transcript of the speech (R. 68-79) reveals that it, on the other hand, contains repeated exhortations to the audience to be calm and peaceful and not resort to any violence. For example, he said (R. 68): "So, no matter what noises you hear—sit still. Don't anybody move." Also (R. 77): "They" (meaning the mob) "are being led; there will be violence. That is why I say to you men, *don't you do it.* Walk out of here dignified. *The police will protect you.* Put the women on the inside, where there will be no hurt to them. Just walk; *don't stop and argue.*" (Emphasis added.)

Petitioner's speech, near the close, contains the following (R. 78 and 79):

> "So, my friends, since we spent much time tonight trying to quiet the howling mob, I am going to bring my thoughts to a conclusion, and the conclusion is this. We must all be like the Apostles before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jew, and those are not American Jews. We don't want them here; we want them to go back where they came from. We are going to stand one and all together and form a solid phalanx of

courage and loyalty and strength and oppose every attempt to breach freedom of speech in America, every attempt to undermine the morality of America, every attempt to shed American blood to promote Zionism in America, every attempt to demoralize our America, every attempt to persecute our cross, every attempt to destroy the sovereignty of America by union with other countries of the world, giving up our own sovereignty.

"Remember this, my friends, that the Holy Father called upon all of us, Catholics, Protestants alike, to form a crusade, and I have done that, I tried to do it. In this crusade we have only three principles, no organization. You just say you stand for these things. See if you don't stand for them. If you do, let me know. The three principles: God first, that is the first principle; the second principle, America next; the third principle, all other nations last."

And the following are the very last words of his speech:

"Let's go out to found in this nation a Christian new order for America."

And the Record indicates (Page 79), immediately following the speech, that Gerald L. K. Smith took his cue from petitioner in desiring to avoid any violence, when he said: "I would like to ask that Miss Purcell would please go back to the front of the building and contact the police officer in charge of the detail. *We are going to adjourn this meeting if and when Miss Purcell comes back and reports to me that the one in charge of the detail believes it is safe for us to go out on the street.*"

Nowhere in petitioner's speech will be found anything supporting the erroneous ruling mentioned above, to the effect that it "tended to incite the majority of his audience to immediate violence against the mob outside".

No "Libel" Or "Slander" Involved.

Respondent's brief is replete with false and irrelevant charges of "libel" and "slander" against petitioner, and cites these as justification for his wrongful conviction. In this connection, respondent even "drags in" the case of *People v. Spielman*, 318 Ill. 482 (Page 23 of respondent's brief), a case involving a charge of *criminal libel*. This case, of course, has no application to the case at bar, though it is, no doubt, cited because it is unique in upholding a charge of libel against a group.

Respondent cites the case of *Ogren v. Rockford Star Printing Co.*, 288 Ill. 405, in support of the statement that "even in the political arena, defamation of a candidate is punishable by the State". This, of course, involved a civil action for damages for libel against a newspaper. It is difficult to imagine just what bearing it could possibly have upon punishment by the State, and still more so to imagine what possible application it has to this cause.

The case at bar involves no "libel" or "slander", as those words are interpreted legally, and those portions of respondent's brief and argument relating thereto should be ignored by this Court.

The "God Damned Liar" Incident.

The Record seems clear that someone, during the course of the meeting in question, got up and said, "You are a God damned liar", to *a speaker*. But it is not clear whether this was done while petitioner was speaking or during Gerald L. K. Smith's speech which preceded petitioner's. Because of the contention that this episode constituted a "breach of the peace" within the hall while petitioner spoke, incited by his speech, it becomes of some importance to examine the Record carefully concerning it.

Supporting respondent's contention that the incident occurred while petitioner spoke, we find the following:

1. Testimony of Elizabeth Dilling, one of the petitioner's witnesses to that effect (R. 97).

Petitioner contends that the incident occurred while Mr. Smith was speaking, and supporting that contention we find the following:

1. Failure of the court reporter's transcript of petitioner's speech to record the incident, though she did record other untoward incidents occurring while petitioner spoke. (In this connection, it should be borne in mind that the court reporter was engaged by petitioner's opponents to "cover" the meeting and record, stenographically, everything that transpired; also that when she testified, she did so as respondent's witness.)

2. Failure of respondent's witness Karel (R. 82) to say when the incident transpired. According to his testimony, it may have occurred during either of the two speeches.

3. Testimony of petitioner's witness Devane (R. 88), who testified, definitely, as follows: " . . . one man got up when Mr. Smith made some statement, and said, 'You are a God damned liar', and there was some officer escorted him out."

4. Ira Latimer, the complainant in the case, and hence the most important witness for respondent, testified as follows about the incident (R. 64): "One man was ejected from the aisle, from the hall, that is the aisle from where I was sitting at the instance of a number of women who pointed to him, and appeared to be in conversation with him, and *I don't recall whether Father Terminiello or Reverend Smith was speaking at the time.*" (Emphasis added.)

Under these circumstances, petitioner feels amply justified in contending that the incident did not occur while he spoke.

But let us assume, just for the sake of argument, that it did occur while petitioner spoke. What situation confronts us in that case?

On page 26 of its brief, respondent states, "It has been held that the utterance of the above-noted epithet amounts to a breach of the peace", and, in support, cites *Johnson v. State* (Texas Criminal Appeals), 66 S. W. 1097. The nature of that case is indicated by the following from the opinion:

> "The trouble in which defendant is charged with using language calculated to bring on a difficulty was in regard to the failure of Moyer to settle for a meal at the hotel, and it occurred at a livery stable. Moyer remarked to Whittenberg, inside the stable, that defendant had lied in regard to the matter. Whittenberg challenged him to make the statement in the presence of defendant. They walked outside the stable, where defendant was, and Moyer denied the statement of defendant, whereupon defendant" (Johnson) "called him a 'God damned liar', and Moyer struck at him with a rake."

In that case Johnson was found guilty of causing a breach of the peace and fined $5. That case would be in point if petitioner, if in fact he were speaking at the time of the incident, had left the rostrum and rushed down into the hall proper and attempted to assault the one who made the remark. Then, the one making the remark would have been guilty of provoking a breach of the peace and he, not petitioner, might justly have been arrested and prosecuted. This case well illustrates the care that should be exercised in considering any case cited by respondent in its brief.

It should be noted in passing that if respondent's contention is correct, one hostile person might invade a meeting, get up at a time deemed appropriate, and say to a speaker, "You are a God damned liar", thereby rendering the speaker subject to arrest and complete abridgment of his right of *free speech*. In such a case, it will be noted, it would take only one person to accomplish the end sought to be accomplished by the lawless rioters involved in this cause, who were intent upon depriving petitioner of his constitutional rights.

"Clear And Present Danger".

The doctrine that "clear and present danger" of the imminence of substantive evil must be present before the rights guaranteed by the First Amendment to the Constitution of the United States may be abridged has been enunciated and affirmed so repeatedly, and so eloquently, by this Honorable Court that an apology almost seems necessary for extending the length of this reply to comment upon it. That doctrine appears indelibly in the decisions of this Court upon which petitioner relies for the support of his contentions. But petitioner feels that, even so, the following quotations on the subject from Professor Chafee's book will assist the Court in arriving at a proper decision in this cause.

Page 23:

> "The real issue in every free speech controversy is this: whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law.
>
> "If words do not become criminal until they have 'an immediate tendency to produce a breach of the peace,' there is no need for a law of sedition, since

the ordinary standards of criminal solicitation and attempt apply. Under those standards the words must bring the speaker's unlawful intention reasonably near to success. Such a limited power to punish utterances rarely satisfies the zealous in times of excitement like a war. They realize that all condemnation of the war or of conscription may conceivably lead to active resistance or insubordination. Is it not better to kill the serpent in the egg? All writings that have even a remote tendency to hinder the war must be suppressed.

"Such has always been the argument of the opponents of free speech. And the most powerful weapon in their hands, since the abolition of the censorship, is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts. Closely related to it is the doctrine of constructive intent, which regards the intent of the defendant to cause violence as immaterial so long as he intended to write the words, or else presumes the violent intent from the bad tendency of the words on the ground that a man is presumed to intend the consequences of his acts. When rulers are allowed to possess these weapons, they can by the imposition of severe sentences create an *ex post facto* censorship of the press. The transference of that censorship from the judge to the jury is indeed important when the attack on the government which is prosecuted expresses a widespread popular sentiment, but the right to jury trial is of much less value in times of war or threatened disorder when the herd instinct runs strong, if the opinion of the defendant is highly objectionable to the majority of the population, or even to the particular class of men from whom or by whom the jury are drawn."

And page 155:

"The formal criminal law is willing to run risks for the sake of open discussion, believing that truth will prevail over falsehood if both are given a fair field, and that argument and counter-argument are the best method which man has devised for ascertaining the right course of action for individuals or a nation. It holds that error is its own cure in the end, and the worse the error, the sooner it will be rejected."

Far-Reaching Effect Of The Case At Bar.

Respondent (page 8 of its brief) makes light of petitioner's contention that the "'two party' or 'multi-party' system under which this Country has prospered and become great" will be endangered if his wrongful conviction is permitted to stand. Elsewhere in respondent's brief, petitioner is accused of misunderstanding, or misinterpreting, the doctrine of "previous restraint".

Petitioner feels that his brief speaks for itself as to both of these matters.

But, nevertheless, he is happy to cite in support of one of these contentions the following, written by a far wiser, smarter, and keener student of the law than any appearing in this cause on either side:

"The sound constitutional doctrine is that public authorities have the obligation to provide police protection against threatened disorder at lawful public meetings in all reasonable circumstances. It is their duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.

"'In no other way can the right of free assembly be made a reality. Surely it must be clear that in or-

der to "secure" the rights of free speech and assembly against "abridgment", it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be "abridged" but could be destroyed by the action of a small minority of persons hostile to the speakers or to the views they would be likely to express."

And:

"'The right of the people peaceably to assemble' cannot mean that the right ceases unless everybody present, including opponents of the speakers, is certain to be peaceable. Law-abiding speakers and their supporters should not be deprived of the great American institution of assemblage in the open air because other persons are intolerant and ready to violate the law against assault and battery. Such a doctrine would mean that a citizen loses his constitutional rights because his opponent threatened to commit crimes.

"'If a permit can constitutionally be refused on the grounds relied upon by the defendants, a small number of lawless men by passing the word around that they intend to start a riot could prevent any kind of a meeting, not only of radicals or Socialists or trade unionists, but also of Negroes, of Jews, of Catholics, of Protestants, of supporters of German refugees, of Republicans in a Democratic community or *vice versa*. Indeed, on any such theory; a gathering which expressed the sentiment of a majority of law-abiding citizens would be forbidden merely because a small gang of hoodlums threatened to break up the meeting."

This quotation is taken from pages 425 and 426 of Professor Chafee's book, "Free Speech in the United States".

Conclusion.

Free speech is the one and only issue in this cause.

In conclusion, the attention of the Court is respectfully directed to the following, with which Professor Chafee closes Section III of Chapter 14, entitled "Methods of Controlling Discussion in Peace Time", of his book (Page 528):

> "Intolerance can always find some crevice in the administration of the law through which to creep and accomplish its purpose. The only remedy is to build up every day and every hour the opposite spirit, a firm faith that all varieties and shades of opinion must must be given a chance to be heard, that the decision between truth and error cannot be made by human beings, but only by time and the test of open argument and counter-argument, so that each citizen may judge for himself.
>
> "Of later years, whenever any controversy has arisen over discussion, constitutional free speech seems to be always just around the corner. People praise this magnificent fundamental right and then deny that it is applicable to this particular agitator or minority group. We are like Oliver Cromwell when he was besieging a Roman Catholic town in Ireland, which offered to surrender on the one condition of freedom of conscience. Cromwell replied:
>
> "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the mass, I would have you understand that in no place where the power of Parliament of England prevails shall that be permitted.
>
> "We should do much better to imitate a contemporary Englishman, Lord Justice Scrutton, who freed an Irishman from illegal arrest with these words:
>
> "'The law of this country has been very jealous of any infringement of personal liberty. This care is not to be exercised less vigilantly, because the subject

whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous."

Petitioner respectfully urges this Honorable Court to reverse the wrongful judgments of the lower Courts in this cause. Should this be done, not only will petitioner, finally, secure the justice to which he feels entitled, but the decision will have far-reaching effects. It will emphatically serve notice that a great, liberal Court is ever vigilant to see that the sacred rights guaranteed by the Constitution are not lightly, and with impunity, trampled upon.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS. THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. MCCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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CRAMPLIN-SHEALY COMPANY, CHICAGO 388

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondent, City of Chicago, opposes the petition for certiorari on the following grounds:

A jury in the Municipal Court of Chicago found the petitioner guilty of the offense of disorderly conduct, in violation of a city ordinance. The Appellate Court of Illinois, First District, reviewed the evidence in detail and affirmed the judgment. (332 Ill. App. 17.) The Supreme Court of Illinois affirmed the judgment of the Appellate Court (Tr. 14.) (400 Ill. 23).

It is the contention of the petitioner that the judgment against him violates his right of free speech and free assembly under the First and Fourteenth Amendments to the Constitution of the United States and under the fourth paragraph of Article II of the Constitution of the State of Illinois. His claim as to the Constitution of the State of Illinois has been disposed of by the judgment of the Supreme Court of Illinois, (400 Ill. 23). The only question before this court is whether his rights under the First and Fourteenth Amendments of the Constitution of the United States have been infringed. It is respectfully submitted that they have not been infringed and that the petition for writ of certiorari should be denied.

I.

THE CONSTITUTIONAL GUARANTEE OF FREE SPEECH DOES NOT PREVENT THE PUNISHMENT FOR LIBELOUS, ABUSIVE AND OFFENSIVE UTTERANCES WHICH HAVE A TENDENCY TO BREACH THE PEACE.

Inherently the petitioner's misplaced reliance upon the constitutional provisions guaranteeing the right to freedom of speech proceeds (1) upon the misapprehension that libelous utterances are sheltered by the guarantee of free speech, (2) upon the failure to recognize that the words "scum" and "slimy scum" are insulting or "fighting" words and (3) upon the inability to appreciate the distinction between "previous restraint" as that concept is defined by the United States Supreme Court and subsequent punishment for a past abuse of the right of free speech. An analysis of the cases relied upon by petitioner will disclose that they completely and emphatically support the judgment in this case.

The key to the problem is succinctly contained in Section 4 of Article II of the Illinois Constitution:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

The significance of the foregoing provision completely escapes petitioner. While it is true that it is a legal impossibility to restrain in advance any utterance, no matter how vicious and reprehensible it may be, a person cannot escape *responsibility and punishment* for utterances which the state has the power to prohibit and punish in the interests of a well ordered society. It is well settled and it is conceded by petitioner that the right of free speech is not absolute and that it must give way in certain instances to the paramount right of society to protect itself from utterances that disturb its peace and tranquility. The issue in this case is whether the petitioner has transgressed the bounds of permissible speech. The Supreme Court of Illinois, the Appellate Court and a jury have held that he has. The only other question to consider is whether the authorities relied on by petitioner hold that the constitution offers him immunity from punishment. It is abundantly clear that they do not.

On page 21 of the petition is cited *Stromberg v. California*, 283 U. S. 359, where, at page 368, the court said:

> "There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime * * *."

The assertion is made (Br. 27) that there is nothing in petitioner's utterances which incite to violence and crime and that there was nothing personal in anything he said (p. 61.) His assertion overlooks the steady stream of slander that he poured indiscriminately upon so many of-

jects of his venom and the words "scum" and "slimy scum" which stand judicially established as words of strong opprobrium and as violence-inciting language. He overlooks in particular the wild tales of alleged mayhem which actually provoked his audience to cries advocating murder, mayhem and sterilization of the objects of his defamatory statements.

Even the dissenting opinion in the Appellate Court, upon which petitioner relies so heavily, states as follows (Tr. 26):

> "The terms 'scum,' 'slimy scum,' and 'skunk's of Jews' are epithets, abusive and insulting terms. They are not in any proper sense communication of information or opinion safeguarded by the constitution."

The decision in *Near* v. *Minnesota*, 283 U. S. 697 (discussed by petitioner on page 30 of his petition), is simply not understood by him. In that case an injunction was sought, pursuant to statute, to restrain a newspaper from publishing malicious, scandalous or defamatory matter. The court reiterated that (page 708):

> "Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."

But the court pointed out (page 711):

> "The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical."

The further effect of the statute is thus described (page 712):

> "The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be 'malicious, scandalous and defamatory,' and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment."

Near v. *Minnesota* presents the clearest possible kind of previous restraint. The case at bar on the contrary presents an attempt to punish in the ordinary sense for past utterances and no attempt is made to restrain, by injunction or otherwise, future utterances of the defendant. Should they, when actually made, be contrary to the public peace, they may then be punished after due conviction by the regular judicial process. This prospect may and should act as a deterrent, but that is not regarded as a previous restraint in the sense defined by *Near* v. *Minnesota*. The petitioner's suggestion that it constitutes a previous restraint because it will restrain him from future like offenses is ludicrous. That is the very purpose of libel laws—to deter. Because previous restraint is not permissible, punishment after the fact is provided with a view to *deter the offenders and others* from like practices. It is the universally accepted justification for punishment of crime of every sort.

The petitioner can derive no comfort from *Thornhill* v. *Alabama*, 310 U. S. 88, where the court invalidated a state act which prohibited *all* picketing. The court held the statute was too broad because (page 104):

> "The range of activities proscribed by Sec. 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected may enlighten the public on the nature and causes of a labor dispute."

The court in the case just cited affirms the power of the state to prohibit acts which tend to breach the public peace. (Page 105.) The ordinance herein involved is narrowly framed to prohibit not all acts and utterances but only such acts and utterances as tend to a breach of the peace. The facts in the case at bar call only for a narrow construction that libelous and personally abusive epithets are

prohibited because they clearly tend to breach the public peace. Petitioner expresses alarm (Br., p. 24) over a "perverted, illegal" use of the ordinance as a threat to the two party system. We cannot believe that the two party system rests upon such tenuous ground as the asserted right to slander persons and groups and to engage in wanton, abusive, insulting epithets and fantastic tales that whip audiences into such frenzy that they demand the murder, crippling and sterilization of the objects of the speaker's slanderous utterances. Counsel for petitioner do not seem to realize that even in the political arena, defamation of a candidate is punishable by the State. (*Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 417.)

Murdock v. *Pennsylvania*, 319 U. S. 105, discussed by petitioner on pages 27-29 of his petition, is clearly distinguishable from the case at bar. In that case the issue of previous restraint was involved. The ordinance under attack imposed a license fee upon canvassing and soliciting. The ordinance was construed to embrace the activities of the religious sect, Jehovah's Witnesses. The court held that the state authorities were powerless to require a license as a prerequisite to the exercise of the privilege of freedom of speech and religion. But the court significantly observed (p. 116):

> "Jehovah's Witnesses are not 'above the law.' But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover; and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation."

The applicability of the foregoing quotation to the case at bar and its support for the ordinance involved and the

charge of its violation are clear. The petitioner protests that the city seeks to impute to his utterances abusive and objectionable matter it does not contain. Reasonable minds cannot possibly disagree that the utterances complained of were abusive and objectionable in the extreme. The jury found it to be so, and the Appellate Court has, by affirming the judgment, rendered their finding conclusive. The threat to public peace was clear as evidenced by the reactions of the audience. The petitioner quibbles about the statement "non-Christian doctors" and "non-Christian nurses" as possibly not meaning Jews. When the defendant was speaking of "non-Christians" "all of one race" (Tr. 74) who were in the armed forces of the country no one could doubt whom he intended to accuse. Considering the tenor of his speech there is no question that he meant Jews. He himself said, "I meant the Jews and others". (Tr. 117.) His assertion that "others" meant "Mohamtnedans" in the armed forces of our country is, of course, ridiculous. (Tr. 118.)

Thomas v. Collins, 323 U. S. 516, like *Near v. Minnesota*, and *Murdock v. Pennsylvania*, involved a question of previous restraint inherent in a state statute that required labor organizers to apply for an organizer's card. For the first time, after reading this decision, the defendant seems to have acquired a measure of understanding of the concept of "previous restraint" because he states, (page 34 of his petition): "There was of course no 'previous restraint' so far as appellant's speech of February 7, 1946, was concerned * * *." The constitution is thus satisfied because it does not concern itself with the deterrent effect of prospective punishment for acts or utterances violating state law operating within its legitimate sphere guarding the public peace. The constitution is content to let

the courts and juries determine whether punishment should be meted out *after* the acts have been committed or the utterances expressed.

The remaining case cited by petitioner (Tr. 34), *Cantwell* v. *Connecticut*, 310 U. S. 296, involving charges that the defendant breached the peace, touches most closely upon the issues in the present case. A thorough understanding of the reasons which led the court to hold the petitioner guilty will impel the affirmance of the judgment in this case.

In the *Cantwell* case, 310 U. S. 296, the court summarizes the law relating to breaches of the peace and defines the power of the state to prevent them (p. 308):

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but *acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect.*" (Italics ours.)

The court pointed out that Cantwell was conducting himself in a peaceful manner. "There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. *It is not claimed that he intended to insult or affront the hearers by playing the record.* It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic." (Pages 308-9—Italics ours.)

In the case at bar, the petitioner intended to and did defame many absent persons as well as groups of persons embracing members of his audience and deliberately insulted some of his hearers by calling them "scum" and "slimy scum." In fact his only regret seemed to be that his vocabulary did not at the moment provide him with more offensive words with which to express his contempt. (Tr. 68.)

That the court in the *Cantwell* case would regard the utterances of the petitioner herein as punishable is clear from the following (page 309):

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent *or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.*" (Italics ours.)

And finally the right of the State to punish utterances tending to breach the peace is made crystal clear by the court (page 310):

> "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish."

The foregoing language is so appropriate to the case at bar that the court might well have been characterizing the utterances of the petitioner herein. The manifest purpose of his words assuredly originated in the "delusion of racial or religious conceit" and they clearly were such as to "incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties."

The petitioner relies upon the language of the court that "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." In view of the entire opinion the petitioner's hope that this language gives him immunity is forlorn. The court manifestly recognized the right of the State to punish the common law offense of breach of the peace *as that offense has been traditionally understood*. With regard to verbal acts the common law offense means libelous, obscene or profane words or abusive epithets. If the State intends to go beyond the traditional definition and bring other acts within its scope, such as playing phonographs on the public streets, then it can do so only by means of a statute narrowly drawn to define and punish specific acts. There is no necessity for, and the court clearly cannot have intended to say and did not say that a narrowly drawn statute must be present to punish those who resort to libel and epithets. Their punishment even in the absence of statute has been recognized for too long a time to admit of any doubt on that score.

Our interpretation of this portion of the opinion is thoroughly justified by the later case of *Chaplinsky v. New Hampshire*, 315 U. S. 568, wherein the court said (571):

> "There are certain *well-defined* and *narrowly limited* classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, *the libelous, and the insulting or 'fighting' words*—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Italics ours.)

It should be noted that the statute in the *Chaplinsky* case was couched in broad language (315 U. S. 569). It prohibited any person from addressing "any offensive, derisive or annoying word" to any other person in a public place. The state court narrowly construed the statute as being designed to preserve the public peace and therefore no words were "forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (315 U. S. 573.)

The state court further interpreted the statute (315 U. S. 573):

> "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general consent are 'fighting words' when said, without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. The statute as construed, does no more than prohibit the face-to-face words plainly likely to

cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

The ordinance should be construed in a way that will render it free from constitutional objection. The ordinance in question was construed in *City of Chicago* v. *Hunt*, 374 Ill. 234. In answer to the charge that it was indefinite and uncertain this court held that a legislative body may use words having a common law meaning. When the city council used the words "breach of the peace" those words must be understood in the light of the common law. So far as verbal acts are concerned the ordinance has in mind and prohibits (in the language of the Supreme Court of the United States) "well-defined and narrowly limited classes of speech, the prevention and the punishment of which have never been thought to raise any Constitutional problem" "the lewd and obscene, the profane, the *libelous, and the insulting or fighting words.*" (315 U. S. 571-2.) (Italics ours.)

Thus construed, and that is the construction we urge, there can be no constitutional objection to the ordinance. Nor can there be any doubt concerning its violation by the petitioner.

Petitioner apparently fails to see any libelous, insulting or fighting words in the speech. We venture to say that the average person would not share this placid reaction to "scum" and "slimy scum." Those words rank high in the list of "classical fighting words." Nor would the average person share with him the naive view that his talk was not slanderous when it overflowed with charges of sedition, official corruption, lack of judicial integrity and a multi-

tude of other offenses climaxed by an accusation of crimes as hideous as the mind of man could conceive—amputation of limbs and injection of syphilis and other disease germs.

The ordinary prosecution for disorderly conduct relates to acts or utterances originating in spontaneous loss of temper or the use of opprobrious language by persons who have little education or breeding and know no better. The tranquility of the public is disturbed for the moment and tranquility reigns again. This case does not present the ordinary situation. This breach of the peace is set in a background of deliberate hate and malice spread by one who has so conducted himself that the Church which once offered him the loftiest of offices—a priesthood—was forced to suspend him. (Tr. 115.) His utterances have been described by his own counsel as "disjointed and disconnected" but "nevertheless, the exposition of ideas is there." If there be any exposition of ideas, it is composed of a theme of hate and fear. These disconnected and disjointed utterances had only one deliberate purpose—to excite the audience to an uncontrollable fever of emotion by pumping them full of hatred and fear. The tranquility is disturbed not only for the moment but the hatred and fear take root and grow long after the incident is over.

The petitioner started with invective against certain members of the audience (Tr. 68). He expressed fear that freedom of speech was being undermined (Tr. 68). He talked about intimidation (Tr. 68). He spoke about impending destruction of America by revolution. He preached hatred of Russia, charging murder of fifteen million people (Tr. 70). He preached hatred of the New Deal, implying it fostered Communism (Tr. 70). He charged Mrs. Roosevelt with being a Communist (Tr. 71). He maligned the motives of Henry A. Wallace in trying to provide jobs (Tr. 71). He urged mistrust of Chief

Justice Stone (Tr. 71). He charged a conspiracy to pervert the F. B. I. (Tr. 71). He charged Washington officials with bribing South American officials (Tr. 72). He charged Morganthau with a plan to starve babies and pregnant women in Germany (Tr. 73). He charged certain non-Christian doctors and nurses, "all of one race", with mayhem and injection of syphilis and disease germs (Tr. 74). He preached contempt for England (Tr. 75). He preached hatred of the Jews (Tr. 75-77). He instilled fear of vaguely defined enemies (Tr. 77). He instilled fear of the Jews (Tr. 79).

It is impossible to conceive of utterances more calculated to disturb the public peace and tranquility. Utterances such as these set the stage for and resulted in the extermination of millions of persons in Europe. The favorite device of aggressor countries was the pretext that they were in danger of persecution and hence were required to take drastic action in self-protection.

We have already shown that the petitioner stepped beyond the bounds of permissible speech in a number of instances. In view of the background against which these transgressions of free speech occurred, there is small wonder that the jury found him guilty, and that the Appellate Court and the Illinois Supreme Court affirmed the judgment.

The Appellate Court did more than merely affirm the verdict of the jury and the judgment of the court. It affirmed in such ringing terms that persons like the petitioner who seem unable to distinguish between what is offensive and libelous and what is innocent are given clearly to understand the limits of constitutionally guaranteed speech. The opinion of the court makes it clear that free speech does not mean loose talk. Defamatory and abusive utterances have no place in the orderly exposition of ideas.

While it is true that persons are guaranteed the right to express thoughts which may be unpopular, they do not have the right to express themselves in language which is inherently offensive or defamatory. This mode of expression should be condemned in emphatic terms so that the peace and good order of the City of Chicago and the State at large will be permanently protected. This case calls for a reaffirmation of the vigorous language of this court in *Cantwell* v. *Connecticut*, 310 U. S. 296, where this court said:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . ."

Conclusion.

This case presents no constitutional question. The Appellate Court of Illinois (332 Ill. App. 17) and the Supreme Court of Illinois (396 Ill. 41, 400 Ill. 23) have specifically held that the question of free speech is not involved here. The only question in this case is the factual question of whether the petitioner was guilty of a violation of the ordinance punishing as disorderly conduct one who makes or aids in making an improper noise or diversion tending to a breach of the peace. This factual question has been settled by the verdict of a jury and the affirmance by the Appellate Court of Illinois and the Supreme Court of Illinois.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CITY OF CHICAGO,

Appellee,

vs.

ARTHUR TERMINIELLO,

Appellant.

CERTIORARI TO SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. MCCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

BRIEF AND ARGUMENT FOR APPELLEE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

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PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

BRIEF AND ARGUMENT FOR APPELLEE.

PRELIMINARY STATEMENT.

A jury in the Municipal Court of Chicago found the defendant, Arthur Terminiello, guilty of the offense of disorderly conduct in violation of Chapter 193, par. 1 (1) of the Revised Code of 1939, as amended. That ordinance, in so far as is here pertinent, provides as follows:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of peace or diversion tending to a breach of the peace, within the limits of the city * * * shall be

deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than One Dollar nor more than Two Hundred Dollars for each offense."

The sworn complaint charged that on the 7th day of February, 1946, he did make, or aid in making, an improper noise, riot, disturbance, breach of peace or diversion tending to a breach of the peace within the limits of the city. The Appellate Court of Illinois, First District, reviewed the evidence in detail and affirmed the judgment (332 Ill. App. 17). The Supreme Court of Illinois affirmed the judgment of the Appellate Court (400 Ill. 23).

The opinions of the Supreme and Appellate Courts of Illinois set forth in considerable detail the factual situation which existed at the time defendant made the speech which forms the background for this prosecution. They also set forth excerpts from the speech which support their conclusion that he was guilty of disorderly conduct in violation of the ordinance. Both courts found that the meeting at which defendant spoke was a public meeting.

The opinion of the Supreme Court, whose decision is here on appeal, finds that, "a breach of the peace occurs whenever there is a violation of the public peace and order and it is immaterial whether the violation originates in a private place or on public property" within the ordinance prescribing a penalty for "breach of the peace, or diversion tending to a breach of the peace within the limits of the city". (400 Ill. 30). It further finds (p. 31) "that Terminiello's conduct and words resulted in actual breaches of the peace both without and within the auditorium. Likewise, his actions amounted to a diversion tending to a breach of the peace." * * * (p. 32) "The meeting was, indeed, a diversion tending to a breach of the peace."

The opinion also points out (p. 32) that the "defendant

opened his remarks by addressing the minority present as 'scum' and asserting that 'Nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake.'" These epithets alone, the court held (p. 32), "directed to certain members of the audience, constituted action tending to a breach of the peace." And, after an analysis of the speech, the court held (p. 33) that "In this manner was defendant guilty of a diversion tending to a breach of the peace by his wild, intemperate and inflammatory utterances. His speech tended to incite the majority of his audience to immediate violence against the angry mob outside."

The Contested Issue.

It is the contention of the defendant that the judgment against him violates his right of free speech and free assembly under the First and Fourteenth Amendments to the Constitution of the United States and under the 4th section of Article II of the Constitution of the State of Illinois. His claim under the Constitution of the State of Illinois has been disposed of by the judgment of the Supreme Court of Illinois (400 Ill. 23). The question of whether the defendant's speech was made in a public or private place has been specifically eliminated from the case by his admission in the brief (p. 16). The only question before this court is whether his rights under the First and Fourteenth Amendments of the Constitution of the United States have been infringed.

POINTS AND AUTHORITIES.

I.

The constitutional guarantee of free speech does not prevent the punishment for slanderous, abusive and offensive utterances which have a tendency to breach the peace.

Stromberg v. *California*, 283 U. S. 359, 368;
Near v. *Minnesota*, 283 U. S. 697, 708, 711, 712 (distinguished);
Thornhill v. *Alabama*, 310 U. S. 88;
Ogren v. *Rockford Star Printing Co.*, 288 Ill. 405, 417;
Murdock v. *Pennsylvania*, 319 U. S. 105 (distinguished);
Thomas v. *Collins*, 323 U. S. 516 (distinguished);
Cantwell v. *Connecticut*, 310 U. S. 296, 308;
Chaplinsky v. *New Hampshire*, 315 U. S. 568, 571;
City of Chicago v. *Hunt*, 374 Ill. 234.

II.

The slanderous, offensive, abusive and insulting utterances of the defendant tended to breach the public peace and actually resulted in a number of public disturbances.

People v. *Spielman*, 318 Ill. 482, 489;
State v. *O'Donnell*, 300 Atl. 739, 741;
Webster's New International Dictionary;
8 American Jurisprudence, p. 834, sec. 3; p. 837;
State v. *Klapprott*, 127 N. J. L. 395, 22 Atl. (2d) 877;
Johnson v. *State*, (Texas Cr. App.) 66 S. W. 1097;
"*Democracy Reborn*," by Russell Lord (Reynal & Hitchcock, Inc., 1944).

ARGUMENT.

I.

The constitutional guarantee of free speech does not prevent the punishment for slanderous, abusive and offensive utterances which have a tendency to breach the peace.

Inherently the defendant's misplaced reliance upon the constitutional provisions guaranteeing the right to freedom of speech proceeds (1) upon the misapprehension that slanderous utterances are sheltered by the guarantee of free speech, (2) upon the failure to recognize that the words "scum" and "slimy scum" are insulting or "fighting" words and (3) upon the inability to appreciate the distinction between "previous restraint", as that concept is defined by the United States Supreme Court, and subsequent punishment for a past abuse of the right of free speech. An analysis of the cases relied upon by defendant will disclose that they completely and emphatically support the judgment in this case.

The key to the problem is succinctly contained in Section 4 of Article II of the Illinois Constitution:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

The significance of the foregoing provision completely escapes defendant. While it is true that it is a legal impossibility to restrain in advance any utterance, no matter how vicious and reprehensible it may be, a person cannot escape *responsibility and punishment* for utterances which the state has the power to punish in the interests of a well ordered society. It is well settled, and it is conceded by

defendant, that the right of free speech is not absolute and that it must give way in certain instances to the paramount right of society to protect itself from utterances that disturb its peace and tranquility. The issue in this case is whether the defendant has transgressed the bounds of permissible speech. The Supreme Court of Illinois, the Appellate Court and a jury have held that he has. The only other question to consider is whether the authorities relied on by him hold that the Constitution offers him immunity from punishment. It is abundantly clear that they do not.

On page 21 of the petition is cited *Stromberg* v. *California*, 283 U. S. 359, where, at page 368, the court said:

> "There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime * * *"

The assertion is made (Br. 27) that there is nothing in defendant's utterances which incite to violence and crime and that there was nothing personal in anything he said. His assertion overlooks the steady stream of slander that he poured indiscriminately upon so many objects of his venom and the words "scum" and "slimy scum" which stand judicially established as words of strong opprobrium and as violence-inciting language. He overlooks in particular the wild tales of alleged mayhem which actually provoked his audience to cries advocating murder, mayhem and sterilization of the objects of his defamatory statements.

Even the dissenting opinion in the Appellate Court, upon which petitioner relies so heavily, states as follows (R. 26):

> "The terms 'scum,' 'slimy scum,' and 'skunks of Jews' are epithets, abusive and insulting terms. They are not in any proper sense communication of information or opinion safeguarded by the constitution."

The decision in *Near* v. *Minnesota*, 283 U. S. 697 (discussed by defendant on page 30 of his petition), is simply not understood by him. In that case an injunction was sought, pursuant to statute, to restrain a newspaper from publishing malicious, scandalous or defamatory matter. The court reiterated that (page 708):

> "Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."

But the court pointed out (page 711):

> "The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical."

The further effect of the statute is thus described (page 712):

> "The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be 'malicious, scandalous and defamatory,' and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment."

Near v. *Minnesota* presents the clearest possible kind of previous restraint. The case at bar on the contrary presents an attempt to punish in the ordinary sense for past utterances and no attempt is made to restrain, by injunction or otherwise, future utterances of the defendant. Should they, when actually made, be contrary to the public peace, they may then be punished after due conviction by the regular judicial process. This ~~prospect~~ may and should act as a deterrent, but that is not regarded as a previous restraint in the sense defined by *Near* v. *Minnesota*. The defendant's suggestion that it constitutes a previous restraint because it will restrain him from future like offenses is ludicrous. That is the very purpose of libel laws—to deter. Because previous restraint is not permissible, punishment

after the fact is provided with a view to *deter the offenders and others* from like practices. It is the universally accepted justification for punishment of crime of every sort.

The defendant can derive no comfort from *Thornhill* v. *Alabama*, 310 U. S. 88, where the court invalidated a state act which prohibited *all* picketing. The court held the statute was too broad because (page 104):

> "The range of activities proscribed by Sec. 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."

The court in the case just cited affirms the power of the state to prohibit acts which tend to breach the public peace. (Page 105.) The ordinance herein involved is narrowly framed to prohibit not all acts and utterances but only such acts and utterances as tend to a breach of the peace. The facts in the case at bar call only for a narrow construction that slanderous and personally abusive epithets are prohibited because they clearly tend to breach the public peace.

Defendant expresses alarm (Br., p. 24) over a "perverted, illegal" use of the ordinance as a threat to the two party system. We cannot believe that the two party system rests upon such tenuous ground as the asserted right to slander persons and groups and to engage in wanton, abusive, insulting epithets and fantastic tales that whip audiences into such frenzy that they demand the murder, crippling and sterilization of the objects of the speaker's slanderous utterances. Even in the political arena, defamation of a candidate is punishable by the State. (*Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 417.)

It is complained (Brief, p. 24) that the effect of this conviction would enable rival political parties to bring about

the arrest of opponents because of offensive sentiments expressed at a political rally. This is based on the language in the opinion (400 Ill. 32) which holds that the meeting itself was a diversion tending to a breach of the peace. It should be noted that the Appellate Court condemned the demonstration outside the hall (R. 17) and the city has at no time condoned the actions of the mob. The finding of the Supreme Court that the meeting itself was a breach of the peace seems to be amply justified by the evidence but even if the finding goes too far, the decision is sustainable on the basis of the use of the epithets "scum" and "slimy scum" and on those portions of the speech which clearly constitute an incitement to violence.

Murdock v. Pennsylvania, 319 U. S. 105, discussed by defendant on pages 27-29 of his petition, is clearly distinguishable from the case at bar. In that case the issue of previous restraint was involved. The ordinance under attack imposed a license fee upon canvassing and soliciting. The ordinance was construed to embrace the activities of the religious sect, Jehovah's Witnesses. The court held that the state authorities were powerless to require a license as a prerequisite to the exercise of the privilege of freedom of speech and religion. But the court significantly observed (p. 116):

> "Jehovah's Witnesses are not 'above the law.' But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation."

The applicability of the foregoing quotation to the case at bar and its support for the ordinance involved and the

charge of its violation are clear. The defendant protests that the city seeks to impute to his utterances abusive and objectionable matter it does not contain. Reasonable minds cannot possibly disagree that the utterances complained of were abusive and objectionable in the extreme. The jury found it to be so, and the Appellate Court has, by affirming the judgment, rendered their finding conclusive. The Supreme Court of Illinois has recognized the binding effect of this finding (400 Ill. 29). The threat to public peace was clear as evidenced by the reactions of the audience. The defendant quibbles about the statement "non-Christian doctors" and "non-Christian nurses" as possibly not meaning Jews. When the defendant was speaking of "non-Christians" "all of one race" (R. 74) who were in the armed forces of the country, no one could doubt whom he intended to accuse. Considering the tenor of his speech, there is no question that he meant Jews. He himself said, "I meant the Jews and others". (R. 117.) His assertion that "others" meant "Mohammedans" in the armed forces of our country is, of course, ridiculous. (R. 118.)

Thomas v. *Collins*, 323 U. S. 516, like *Near* v. *Minnesota*, and *Murdock* v. *Pennsylvania*, involved a question of previous restraint inherent in a state statute that required labor organizers to apply for an organizer's card. For the first time, after reading this decision, the defendant seems to have acquired a measure of understanding of the concept of "previous restraint" because he states (page 34 of his petition): "There was of course no 'previous restraint' so far as appellant's speech of February 7, 1946, was concerned * * *." The constitution is thus satisfied because it does not concern itself with the deterrent effect of prospective punishment for acts or utterances violating state law operating within its legitimate sphere guarding the public peace. The constitution is content to let

the courts and juries determine whether punishment should be meted out *after* the acts have been committed or the utterances expressed.

The remaining case cited by defendant (Br. 35), *Cantwell v. Connecticut*, 310 U. S. 296, involving charges that the defendant breached the peace, approaches most closely upon the issue in the present case. A thorough understanding of the reasons which led the court to hold the defendant guilty will impel the affirmance of the judgment in this case.

In the *Cantwell* case, 310 U. S. 296, the court summarizes the law relating to breaches of the peace and defines the power of the state to prevent them (p. 308):

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but *acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect.*" (Italics ours.)

The court pointed out that Cantwell was conducting himself in a peaceful manner. "There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. *It is not claimed that he intended to insult or affront the hearers by playing the record.* It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street; to have drawn a crowd, or to have impeded traffic." (Pages 308-9. Italics ours.)

In the case at bar, the defendant intended to and did defame many absent persons as well as groups of persons

embracing members of his audience and deliberately insulted some of his hearers by calling them "scum" and "slimy scum." In fact his only regret seems to be that his vocabulary did not at the moment provide him with more offensive words with which to express his contempt. (R. 68.)

That the court in the *Cantwell* case would regard the utterances of the petitioner herein as punishable is clear from the following (page 309):

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent *or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.*" (Italics ours.)

And finally, the right of the State to punish utterances tending to breach the peace is made crystal clear by the court (page 310):

> "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish."

The foregoing language is so appropriate to the case at bar that the court might well have been characterizing the

utterances of the defendant herein. The manifest purpose of his words assuredly originated in the "delusion of racial or religious conceit" and they clearly were such as to "incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties."

The defendant relies (Br., p. 35) upon the language of the court in the *Cantwell* case, that "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." In view of the entire opinion his hope that this language gives him immunity is forlorn. The court manifestly recognized the right of the State to punish the common law offense of breach of the peace *as that offense has been traditionally understood*. With regard to verbal acts the common law offense means libelous, obscene or profane words or abusive epithets. If the State intends to go beyond the traditional definition and bring other acts within its scope, such as playing phonographs on the public streets, then it can do so only by means of a statute narrowly drawn to define and punish specific acts. There is no necessity for, and the court clearly cannot have intended to say and did not say that a narrowly drawn statute must be present to punish those who resort to libel and epithets. Their punishment even in the absence of statute has been recognized for too long a time to admit of any doubt on that score.

Our interpretation of this portion of the opinion is thoroughly justified by the later case of *Chaplinsky v. New Hampshire*, 315 U. S. 568, wherein the court said (571):

> "There are certain *well-defined* and *narrowly limited* classes of speech, the prevention and punishment

of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, *the libelous, and the insulting or 'fighting words'*—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Italics ours.)

It should be noted that the statute in the *Chaplinsky* case was couched in broad language (315 U. S. 569). It prohibited any person from addressing "any offensive, derisive or annoying word" to any other person in a public place. The state court narrowly construed the statute as being designed to preserve the public peace and therefore no words were "forbidden except such as have a direct tendency to cause acts of violence by the person to whom individually, the remark is addressed." (315 U. S. 573)

The state court further interpreted the statute (315 U. S. 573):

> "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. The statute as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in

current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

The ordinance should be construed in a way that will render it free from constitutional objection. The ordinance in question was construed in *City of Chicago* v. *Hunt*, 374 Ill. 234. In answer to the charge that it was indefinite and uncertain the Supreme Court of Illinois held that a legislative body may use words having a common law meaning. When the city council used the words "breach of the peace" those words must be understood in the light of the common law. So far as verbal acts are concerned the ordinance has in mind and prohibits (in the language of the Supreme Court of the United States) "well-defined and narrowly limited classes of speech, the prevention and the punishment of which have never been thought to raise any Constitutional problem" "the lewd and obscene, the profane, the *libelous, and the insulting or fighting words.*" (315 U. S. 571-2:) (Italics ours.)

Thus construed, and that is the construction we urge, there can be no constitutional objection to the ordinance. Nor can there be any doubt concerning its violation by defendant.

Defendant apparently fails to see any slanderous, insulting or fighting words in the speech. We venture to say that the average person would not share this placid reaction to "scum" and "slimy scum." Those words rank high in the list of "classical fighting words." Nor would the average person share with him the naive view that his talk was not slanderous when it overflowed with charges of sedition, official corruption, lack of judicial integrity and a multitude of other offenses climaxed by an accusation of crimes as hideous as the mind of man could conceive—amputation of limbs and injection of syphilis and other disease germs.

The ordinary prosecution of disorderly conduct relates to acts or utterances originating in spontaneous loss of temper or the use of opprobrious language by persons who have little education or breeding and know no better. The tranquility of the public is disturbed for the moment and tranquility reigns again. This case does not present the ordinary situation. This breach of the peace is set in a background of deliberate hate and malice spread by one who has so conducted himself that the Church, which once offered him the loftiest of offices—a priesthood,—was forced to suspend him. (R. 115.) His utterances have been described by his own counsel in his brief in the Supreme Court of Illinois (p. 30) as "disjointed and disconnected" but "nevertheless, the exposition of ideas is there." If there be any exposition of ideas, it is composed of a theme of hate and fear. These disconnected and disjointed utterances had only one deliberate purpose—to excite the audience to an uncontrollable fever of emotion by pumping them full of hatred and fear. The tranquility is disturbed not only for the moment but the hatred and fear take root and grow long after the incident is over.

The defendant started with invective against certain members of the audience (R. 68). He expressed fear that freedom of speech was being undermined (R. 68). He talked about intimidation (R. 68). He spoke about impending destruction of America by revolution. He preached hatred of Russia, charging murder of fifteen million people (R. 70). He preached hatred of the New Deal, implying it fostered Communism (R. 70). He charged Mrs. Roosevelt with being a Communist (R. 71). He maligned the motives of Henry A. Wallace in trying to provide jobs (R. 71). He urged mistrust of Chief Justice Stone (R. 71). He charged a conspiracy to pervert the F.B.I. (R. 71). He charged Washington officials with bribing South American officials (R. 72). He charged

Morgenthau with a plan to starve babies and pregnant women in Germany (R. 73). He charged certain non-Christian doctors and nurses, "all of one race", with mayhem and injection of syphilis and disease germs (R. 74). He preached contempt for England (R. 75). He preached hatred of the Jews (R. 75-77). He instilled fear of vaguely defined enemies (R. 77). He instilled fear of the Jews (R. 79).

The portions of the speech set forth in the opinions of the Supreme Court of Illinois and the Appellate Court, even without a reading of the entire speech, make it manifest that his utterances were clearly calculated to disturb the public peace and tranquility. Utterances such as these set the stage for and resulted in the extermination of millions of persons in Europe. The favorite device of aggressor countries was the pretext that they were in danger of persecution and hence were required to take drastic action in self-protection.

We have already shown that the defendant stepped beyond the bounds of permissible speech in a number of instances. In view of the background against which these transgressions of free speech occurred, there is small wonder that the jury found him guilty, and that the Appellate Court and the Illinois Supreme Court affirmed the judgment.

The Appellate Court and the Illinois Supreme Court did more than merely affirm the verdict of the jury and the judgment of the court. They affirmed in such ringing terms that persons like the defendant who seem unable to distinguish between what is offensive and slanderous and what is innocent are given clearly to understand the limits of constitutionally guaranteed speech. The opinion of the court makes it clear that free speech does not mean talk

which incites to violence. Defamatory and abusive utterances have no place in the orderly exposition of ideas. While it is true that persons are guaranteed the right to express thoughts which may be unpopular, they do not have the right to express themselves in language which is inherently abusive or constitutes incitement to breach of the peace. This mode of expression should be condemned in emphatic terms so that the peace and good order of the City of Chicago and the State at large will be permanently protected. This case calls for a reaffirmation of the vigorous language of this court in *Cantwell* v. *Connecticut*, 310 U. S. 296, where this court said:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot * * *."

II.

The slanderous, offensive, abusive and insulting utterances of the defendant tended to breach the public peace and actually resulted in a number of public disturbances.

While plaintiff is of the opinion that our first point has effectively demonstrated that the appeal of the defendant should be rejected on the constitutional grounds discussed, we deem it not inappropriate to point out that the Supreme Court of Illinois and the Appellate Court were entirely justified in affirming the Municipal Court of Chicago on all points.

The authorities clearly and convincingly establish that the conviction was correctly sustained on the ground that the utterances of the defendant constitute a diversion tending to a breach of the peace even in normal times and under ordinary conditions. But the courts will take judicial notice that these are not normal times and the record discloses

that the conditions attending the defendant's acts were not ordinary. Under these circumstances the defendant's offense assumes a magnitude far greater than the petty charge of disorderly conduct ordinarily connotes. The times and conditions being what they are the defendant's conduct strikes at the very foundation of public tranquility.

We have just concluded the most catastrophic war in history. During its progress the one prayer on the lips of every decent American, in fact of every liberty loving person the world over, was for unity of the American people. Before we entered the war, and during its progress, we were plagued by a small minority who were not only sympathetic to the enemy, but through confederation or otherwise labored assiduously to aid him. The methods used were precisely those employed by the mad prophet of the enemy—the stirring up of fear of and hatred for the administration and selected groups of citizens. Their manifest purpose here was to divide our citizenry, weaken our morale and divert our minds from concentrating upon the real danger which confronted us from the fiend who ruled the chief enemy country. To them the arrogant and brutal aggressors were not the enemy. To them the New Deal, the international bankers, etc., etc., were the enemies.

This Court is not unaware of the extent to which emotions were aroused and passions stirred by the propaganda of those who advocated American disunity by preaching racism. Time for the cooling of passions had not passed when the meeting was called by Gerald L. K. Smith in the very center of one of the most cosmopolitan cities in the world, and in his invitation calls upon the people to come and hear "the Father Coughlin of the South" and states that "I wish it were possible for me to preside over a meeting where I could introduce Father Charles E. Coughlin [whom the church was compelled to silence because of his sub-

versive, abusive and hate engendering speeches]. Unable to do this as yet, I consider that Father Terminiello is the best, if not the only substitute that can be found in the United States." We respectfully ask this Honorable Court: What greater incitement to disturbance of the peace of a great community could be conceived of by the most diabolically ingenious mind than a meeting so staged and so heralded? The provocative character of the act of calling the meeting was a matter of common knowledge which is significantly evidenced by the fact that the police were stationed inside and outside the Auditorium to quell any breach of the peace that might ensue.

This being the explosive background against which the offense of the defendant was committed, the affirmance of the conviction by the Appellate Court and the Supreme Court of Illinois stands on unshakable ground. We concede that the meeting could not be legally stopped, nor could the defendant be prevented from making his speech because that would constitute a previous restraint, but democratic government would decay and fall if it were not strong enough to check such depredations by punishing those who have perpetrated them.

In our own day and generation, in another country, such hate-mongering produced the most hideous catastrophe known to history. While we have no fear that America's purveyors of hate will stir up this country to the same madness as did their exemplars in Germany, it is not beyond the realm of probability that disastrous race riots may result. Must the authorities wait until some one is murdered as a result of this diabolical conspiracy against the peace of our country before they can take action to punish the conspirators?

The defendant urged his innocence of the offense of a breach of the peace or a diversion tending to a breach of

the peace upon the two-fold ground that his utterances were not such as to provoke a disturbance and that the utterances could not legally create a public disturbance because they were made at an alleged private meeting. The Supreme Court of Illinois has held that neither ground has the slightest merit.

The defendant was charged with committing a breach of the peace and that he did make or aid in making an improper noise or diversion tending to a breach of the peace (R. 53). Webster's New International Dictionary (Second Edition) defines "diversion" as "an act of turning a person from an occupation or purpose." Simply stated, therefore, the defendant was charged with an act which tends to turn persons from their orderly occupations or purposes and incites them to breach the peace.

Concerning the definition of a breach of the peace there cannot be any dispute. It is a "violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others to break the peace, or, as sometimes said, it includes any violation of any law enacted to preserve peace and good order." (8 American Jurisprudence, page 834, section 3.) It is well settled that the use of opprobrious, abusive, insulting, or profane language may amount to a breach of the peace. (8 American Jurisprudence, page 837.)

The excerpts from the defendant's talk set forth in the opinions of the Appellate Court (R. 8-15) and of the Supreme Court of Illinois (R. 138-9) are ample to convince any but the most irrational mind that the inevitable consequence of defendant's utterances was to disturb the peace and tranquility of everyone who heard them. (The speech appears at page 68 of the transcript.) Wild and fantastic stories of mayhem, rape, official corruption, sedition, revolution and other offenses followed each other in rapid and

incoherent succession. The utterances of the defendant were all calculated to instill fear in the audience against vague, undefined alleged enemies of all Christians (R. 78). The defendant deliberately intended to instill fear in those of his audience who were believed to share his philosophy of pitting race against race so that they would contribute to the cost of the activities of the organization sponsoring the meeting, which organization was represented to be the protector of the Christians against the alleged machinations of the non-Christians. The inevitable consequence of the utterances was also to instill fear in the minds of the Jews who were present in the audience—fear that the emotions and passions of the audience would be aroused to such a pitch that violence against their persons would ensue.

The libelous character of the defendant's utterances were of the most aggravated nature and covered a wide range. Individuals, public officials, professional people, religious groups and whole nations were defamed and reviled by the defendant. Mrs. Roosevelt is charged with being a Communist (R. 71). The integrity of Henry A. Wallace in seeking to provide 60,000,000 jobs is impugned (R. 71). The lack of integrity of Chief Justice Stone based upon his alleged disrespect for constitutional guarantees is charged (R. 71). A plot to undermine the FBI is alleged (R. 71). Bribery of South American officials by American officials is asserted (R. 72). Morgenthau is accused of a plan to starve little babies and pregnant women in Germany. (R. 73). Jewish doctors and nurses are accused of the most gruesome of crimes, mayhem and the injection of syphilis and and other disease germs (R. 74).

It is difficult to imagine utterances which are more calculated to make the hearer's blood boil with indignation. It requires only the possession of a rational mind to understand that the vicious libels spouted by the defendant in

the presence of a mixed audience composed of persons who shared the speaker's views and philosophy and those who disagreed with them must inevitably result in a breach of the peace. The clearest proof of this is the fact that breaches of the peace actually occurred.

Since the verdict of the jury was in favor of the plaintiff, and the judgment has been affirmed by the Appellate Court, the testimony in the case must be taken in a light most favorable to the plaintiff. It must be accepted that the jury believed the plaintiff's witnesses and refused to believe the defendant's witnesses where the testimony was in conflict. Mrs. Lipman testified that one of the audience stated, "Yes, the Jews are all killers, murderers. If we don't kill them first, they will kill us" (R. 58). Latimer testified that the audience expressed anger and that one of the audience said that the "Jews and niggers and Catholics would have to be gotten rid of" (R. 64). There were howls, hoots, cries and shouts at various points in the defendant's speech (R. 64). The audience was disturbed and angry (R. 64). Karel testified that everybody started to holler "Yes, send the Jews back to Russia. Kill the Jews" and that several women in the audience hollered "they ought to do that to the Jews, they ought to cripple them" (R. 80); and further, that the audience said "they ought to starve the Jews," "they ought to kill Morgenthau" (R. 84). Immediately after the narration by the defendant of the tale that "non-Christian" doctors had committed mayhem someone in the audience reminded the speaker of "the plan to sterilize them" (R. 118). The reactions of the audience were the expected and inevitable consequences of the defendant's inflammatory words. That is the reason why the law condemns and punishes incitement to crime.

In *People* v. *Spielman*, 318 Ill. 482 the defendant had published an editorial charging members of the American Le-

gion with indolence and attempts to obtain their livelihood by criminal means and accused them of crime, venality and lawlessness. In upholding the conviction of the defendant on a charge of criminal libel the court said, (page 489):

> "Criminal liability for libels rests upon their tendency to provoke breaches of the peace. [Citing Authorities]. The libel need not be on a particular person. It may be upon a family, class, corporation or other body. [Citing Authorities]. *A libel upon a class or group has as great a tendency to provoke a breach of the peace or to disturb society as has a libel on an individual*, and such a libel is punishable even though its application to individual members of the class or group cannot be proved." (Italics ours.)

It is submitted that the utterances of the defendant fairly reek with statements of a most reprehensible nature which the jury was thoroughly justified in finding tended to breach the public peace. The defendant's conception of the meeting as calm and orderly when the audience had been aroused by the defendant's slanderous utterances to react with shouts calling for murder and mayhem discloses an amazing inability to understand the meaning of peace and tranquility.

The defendant did not confine himself to maligning absentee individuals and groups. He resorted to personal abuse directed to certain members of the audience. In doing so he employed epithets which fall squarely within judicial condemnation as constituting action tending to breach the peace. In *State v. O'Donnell*, 209 Atl. 739 the defendant was convicted of disorderly conduct. His conduct consisted in the utterance of the following language:

> "Mr. Tuso is a damn rat and scum of the earth. Judge Loder is like Tommy Tuso, the scum of the earth and a damn rat, good for nothing, the burrough police are a bunch of damn rats; they are the cause of all this trouble."

The attorneys for the defendant in that case shared the amazing philosophy of the defendant in this case and saw nothing offensive in the above quoted language. The Supreme Court of New Jersey, however, was of a contrary opinion. It said, page 741:

> "With respect to the ordinary meaning of 'rat' and 'scum of the earth' when used as epithets, it is a matter of common knowledge that they are expressions of strong opprobrium. They imply baseness of character and vileness of mind, emotions and intentions. They are selected when one intends to be offensive. * * * 'Scum' [is defined] as 'refuse, off-scourings, anything vile or worthless, hence, vile or worthless persons; low people.' I am of the opinion that such epithets are clearly offensive."

Counsel for defendant in the above case again paralleling the philosophy of defendant in the instant case urged that the constitutional guarantee of free speech offered the defendant immunity from prosecution for his offensive utterances. The court emphatically rejected this contention. The decision of the New Jersey court on the issue of free speech should be given extraordinary weight because it was rendered by a court that had a keen appreciation of the scope of the constitutional guarantee. This is forcefully demonstrated by the later case of *State* v. *Klapprott*, 127 N. J. L. 395, 22 Atl. (2d) 877 wherein the same court struck down, on grounds of indefiniteness and undue breadth, a statute directed against statements inciting, promoting or advocating hatred, abuse, violence or hostility against any group of persons in the state by reason of race, color, religion, or manner of worship.

It is therefore abundantly clear that a case of disorderly conduct against the defendant herein is established aside from all other considerations by his use of the words "scum" and "slimy scum" (R. 68). The defendant re-

marked that "nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake." It is apparent that the defendant underrated his linguistic ability to express his contempt because he could not have selected more powerful words to accomplish his purpose of giving offense. The New Jersey court in the quotation above given has defined the word "scum". The defendant, fearful that "'scum" was not offensive enough, superimposed the additional opprobrious epithet "slimy" which is defined by Webster as "vile; offensive; vulgar; highly contemptuous." Considering the explosive setting in which these words were uttered they acquired even greater force as potential disturbers of the peace.

The defendant himself confesses that this was an intemperate remark, (R. 146), and apparently realizes that he should not have made it. It is furthermore clear that the defendant deliberately addressed these remarks to persons in the audience, as is evidenced by his remark that they "got in by mistake." Accordingly, even if the defendant had not thereafter embarked upon this theme of vilification, achieving new heights of provocation, the conviction in this case would be well grounded.

The utterances of the defendant resulted in still another breach of the peace. Karel testified that he heard someone get up and say "You are a God damned liar." (R. 82.) The defendant's witness Mrs. Dilling testified that while the defendant was speaking a man in the back of the hall got up and said "You are a God damned liar" and was ushered out by the police. (R. 97.) It has been held that the utterance of the above quoted epithet amounts to a breach of the peace. *Johnson v. State* (Texas Criminal Appeals) 66 S. W. 1097. It is therefore established by the defendant's own witness that a breach of the peace occurred during the defendant's talk. There can be no question that the de-

fendant's utterances provoked this breach of the peace and that therefore upon this incident alone the conviction that he was guilty of a diversion tending to a breach of the peace is proper.

The defendant did not hesitate to stoop to a vicious distortion of Henry Wallace's remarks. He quoted Wallace as follows (R. 71):

> "Here he is, what he says about revolution: 'We are in for a profound revolution. Those of us who realize the inevitableness of the revolution, and are anxious that it be gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody.'"

The address from which defendant purports to quote appears in a volume entitled "Democracy Reborn", which contains selections from public papers of Henry A. Wallace, by Russell Lord, published by Reynal & Hitchcock, Inc., copyright 1944, pp. 38-39. Mr. Wallace said:

> "*We are in for a profound revolution*, partly as a result of the aftermath of two great wars and partly as a result of 150 years of modern technology and democratic thinking about the rights and duties of man. *Those of us who realize the inevitability of revolution are anxious that it be gradual and bloodless instead of sudden and bloody.* We believe it can be gradual and bloodless if the makers of public opinion, if the politicians, if the pressure-group leaders will only influence their millions of followers on behalf of the public good instead of regional and class prejudices. It would be simple if light could come down from heaven, but we all know that God helps those who help themselves. The people themselves will have to educate their leaders on behalf of the general welfare, measuring every article in the press, every statement over the radio, every act of Congress by the one yardstick: 'Does this help use all our resources, employ all our men, develop all our skills?' If the people everywhere hold these judgments up as a measure, we shall gradually find this principle of 'goodness' permeating our national life like a

> heaven. In no other climate can there be profits for our private-enterprise economy. We must fight with all our might to do this thing. *Otherwise we shall have a bloody revolution and slavery.* Time is pressing. Victory will bring problems on us so thick and fast that we must be prepared to make instant and correct decisions."

We have italicized the portions of Mr. Wallace's address which the defendant in his speech (R. 71) purported to quote. The court will note how little the defendant actually quoted from Mr. Wallace, how he lifted a few words and a sentence from the context to express a meaning far removed from that which was expressed by Mr. Wallace. We call the court's attention particularly to the quotation by defendant attributed to Mr. Wallace when defendant said: "Of course, if necessary, we will have it more bloody". The closest to which this statement of defendant's approximates is the last italicized sentence where Mr. Wallace said: "Otherwise we shall have a bloody revolution and slavery". This statement followed Mr. Wallace's pronouncement that revolution can be gradual and bloodless if the makers of public opinion, if the politicians, if the pressure-group leaders will only influence their millions of followers on behalf of the public good instead of regional and class prejudices. Mr. Wallace's speech was far removed from the hate-mongering speech of the defendant and the language lifted by the defendant in the purported quotation conveys a meaning which in no way resembles that given to it by Mr. Wallace.

It is understandable why the Supreme Court of Illinois characterized defendant's remarks as double-talk (400 Ill. 33).

It is also understandable why the Appellate Court (R. 15), after referring to this portion of defendant's speech, said:

"If these statements, coupled with the rest of his speech, are not an appeal to fury and an incitement to disorder and violence, then these words lose their English meaning."

When we consider the circumstances attending the meeting at which the defendant spoke, his utterances appear reprehensible in the extreme. Outside the hall a large number of people had formed a picket line to protest the utterances which they anticipated would be forthcoming at the meeting. The persons who entered came into the hall after passing through the picket line and of necessity were tense because of the activity on the outside. Some of the persons who entered the meeting place were Jews. Others were Gentiles who were opposed to the principles of the organization. The speaker was aware of that because he opened his address by directing insulting remarks at them. In this tense atmosphere, charged with dangerous potentialities, the defendant should have exercised the utmost restraint in an attempt to calm the audience. To the contrary, he deliberately and designedly set about to add fuel to the mounting fire in an effort to raise the emotions of the audience to the boiling point. This he well succeeded in doing, as testified to by those witnesses who were believed by the jury.

Reasonable minds cannot disagree that the defendant was guilty of acts tending to breach and actually breaching the public peace. His conviction by the jury was more than understandable. Any other result would have been a clear miscarriage of justice.

Conclusion.

The Supreme Court of Illinois significantly points out (400 Ill. 34) that

"In cases of which the present cause is typical, it is customary to inject the issue of freedom of speech so as to create the false impression that great constitu-

> tional questions are involved and sacred constitutional rights are jeopardized."

That court clearly recognized that the only real question here

> "resolves itself into whether the conduct and utterances of defendant constituted a breach of the public peace or a diversion tending to a breach of the public order and tranquility."

Stripped of defendant's attempt to cloak his vituperative utterances in the mantle of the Federal Constitution, it plainly appears that the facts have been found against him by a jury and affirmed by the Appellate Court of Illinois; that under the laws of Illinois, the facts so found are conclusive and binding upon the Supreme Court of Illinois; that the Supreme Court of Illinois has found as a matter of law that the defendant was guilty and that no constitutional right has been violated.

We respectfully submit that defendant has failed to show any impairment of any right under the First or Fourteenth Amendments. On the contrary, we have demonstrated that the decisions of this Honorable Court amply justify affirming the defendant's conviction.

The judgment appealed from should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN JEWISH CONGRESS AS AMICUS CURIAE AND MOTION

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned as counsel for the American Jewish Congress respectfully moves this Court for leave to file the accompanying brief as Amicus Curiae.

The American Jewish Congress is an organization consisting of thousands of Americans of Jewish faith and ancestry. The issue presented to this Court in this case is the extent to which a professional agitator may go in fomenting hatred and violence against Jews without ex-

ceeding the bounds of freedom of speech. At the beginning of our brief we set forth the importance of the issue to American Jewry.

We have sought, but have been unable to obtain, the consent of counsel for the parties to the filing of this brief.

Dated: Chicago, Illinois, January 24, 1949.

Respectfully submitted,

BYRON S. MILLER,

Counsel for American Jewish Congress.

IN THE

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ARTHUR TERMINIELLO,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE.

INTEREST OF THE AMERICAN JEWISH CONGRESS.

The American Jewish Congress was organized in part "* * * to safeguard the civil, political, economic and religious rights of Jews everywhere" and "* * * to help preserve, maintain and extend the democratic way of life."

In the three decades of its existence the American Jewish Congress, on frequent occasions, has represented the democratic interests of the Jewish people before the courts, legislatures and administrative tribunals of the State and

Federal governments. Its work, however, has never been confined to the interests of the Jewish people alone. It has believed, indeed, that Jewish interests are best served by strengthening the democratic operation of American institutions.

Freedom of speech, particularly freedom to espouse unpopular causes, is fundamental to the health of any society and particularly essential for the well-being of minority groups. That this freedom is not absolute is well established; but its limits appear shrouded in generalities. We believe that preservation of the vitality of freedom of speech requires that its boundaries be carefully delineated, lest its protections on the one hand be weakened by uncertainty of scope or on the other serve unwittingly to shelter the seeds of its own destruction by force. This further definition is particularly important where, as in the instant case, the speech involved was essentially an attempt to foment hatred of Jews.

For these reasons the American Jewish Congress is deeply concerned with the outcome of this case and is impelled to submit this brief *amicus curiae*.

Statement.

Petitioner was arrested upon a sworn complaint, filed in the Municipal Court of Chicago, charging in the language of the Chicago ordinance that on February 7, 1946, petitioner did make or aid in making an improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace within the limits of the City in violation of chapter 193, section 1 (1) of the Revised Code of 1939, as amended.

Upon a trial with a jury, a verdict was returned finding him guilty and assessing a fine against him of $100. Judgment was entered upon the verdict.

Petitioner appealed directly to the Illinois Supreme Court but the cause was transferred to the Appellate Court. The Appellate Court, with one judge dissenting, affirmed. The Supreme Court of Illinois granted petitioner leave to appeal and thereafter unanimously affirmed the conviction.

Petitioner's conduct which gave rise to his conviction in this case is reviewed in considerable detail in the opinions of the courts below. Both state courts concluded that petitioner had created a diversion tending to several breaches of the peace. Both found petitioner's conduct clearly outside the pale of Constitutional protection under the First and Fourteenth Amendments.

The Issues to Which This Brief Is Addressed.

The actions of defendant Terminiello as disclosed in the record in this proceeding merit the most severe condemnation that any man respecting the dignity of the individual can express. The issues presented to this Court, however, are considerably narrower than would be inherent in a moral judgment of Terminiello's behavior. It is submitted that upon the record before this Court, defendant's conviction should be affirmed upon a more precise delineation of the exceptions to freedom of speech than appear in the opinions of the courts below.

Before considering the precise propositions we believe to be before this Court, there may be some value in isolating the questions *not* present in this proceeding despite references to them at various points in the Record:

First, the argument has been made and even adopted by the Illinois Supreme Court in its opinion below that the defendant

> "by his conduct in scheduling an address in a large auditorium, invited a storm of protest. . . . Just as he

> drew his audience into the auditorium, he drew hundreds of his antagonists to the area adjacent to the hall. As related, the explosive situation thus created by defendant resulted in innumerable acts of violence . . . . The meeting was, indeed, a diversion tending to a breach of the peace." (R. 142-43.)

We believe this conclusion of the court below to be both in error and unnecessary to affirmance of Terminiello's conviction.

Freedom of speech would be sharply limited if the unpopularity of a speaker or his topic could make his calling of a meeting a breach of the peace even before he opened his mouth. If calling the meeting alone was an offense, then Henry Wallace could have been similarly prosecuted for scheduling a meeting in the heart of the South to attack racial discrimination.

Second, no question of "previous restraint" is present in this case. No claim is made that defendant was obliged to fulfill some unconstitutional requirement before being allowed to make his speech. Punishment for the speech itself *after* its delivery has never been considered a "previous restraint."

Third, the many libels contained in defendant's speech are irrelevant here. This is a prosecution for making or aiding "a diversion tending to a breach of the peace." In such a case all eyes must be focussed on the relationship between defendant's conduct and an actual or potential breach of the peace. Such a judgment takes no cognizance of the truth or falsity of defendant's remarks; indeed, it is easy to conceive of circumstances in which true remarks may be held to be a breach of the peace. A man accused of being a "dirty liar" may merit the accusation; but the accuser might nevertheless be subject to prosecution for breach of the peace.

Fourth, defendant's conduct in fomenting religious and political hatred insofar as they may lead to violence at some indefinite future time is not the ground for conviction here. Were this a prosecution under a statute aimed directly at the deliberate fomentation of racial or religious hatred, the poisonous propaganda of defendant's remarks would alone be cause for punishment. But the Illinois Supreme Court has held that the ordinance in question essentially adopts the common law offense of breach of the peace (*City of Chicago* v. *Hunt,* 374 Ill. 234), and indeed in its opinion below construed the ordinance to apply only to actual disturbances or incitation to *immediate* violence. Within the limited framework of this prosecution, then, the longer-range consequences of defendant's statements are not pertinent.

This discussion of related questions not involved in the present proceeding would be incomplete without a clear statement of the narrow issues we conceive to be before this Court.

We believe the conviction of Terminiello rests upon three separate and distinct bases, any one of which is sufficient to warrant affirmance. Enumeration of these grounds follows.

Summary of Argument.

I. Defendant's conduct in addressing members of the audience as "scum" and "slimy scum" was alone sufficient to warrant the conviction below.

The use of "fighting" or "abusive" words has frequently been recognized by this Court as punishable without infringing upon freedom of speech.

II and III. Defendant's conduct was properly found by the courts below to constitute: (a) incitement of his

supporters in the audience to violence against the dissenters present in the auditorium; and (b) incitement of his supporters to violence against members of the group outside the auditorium.

Both courts below found sufficient evidence in the record to support jury findings that defendant's actions created a diversion tending to one or more breaches of the peace.

ARGUMENT.

Point I.

Defendant's conduct in addressing members of the audience as "scum" and "slimy scum" was alone sufficient to warrant the conviction below.

The conduct forming the basis for the prosecution in this case took place a scant five months after the end of World War II, a war fought to stem the forces of fascism. At a time when many American soldiers had not yet been demobilized from service in this war, defendant Terminiello deliberately chose to designate those in the audience who were not his "fellow Christians" as "scum" and as "slimy scum."

While counsel for defendant urges in his petition for *certiorari* that "nothing personal" was intended by Terminiello for the Jews in the audience, note must be taken that one of the factors leading the United States to declare war was the Nazis' systematic extermination of 6,000,000 Jews in Europe. With this destruction fresh in the minds of American Jewry, Terminiello is chargeable with knowledge that a vituperative attack explicitly aimed at Jews present in the audience would be interpreted by them as of a piece with Nazi anti-Jewish aggression. Though defendant did not single them out by name, Jews in the audience should reasonably have been expected to view Terminiello's revilings as a recurrence of the Nazi threat in their midst. The heightened sensitivity of Jews everywhere to Nazi vilification tactics is a factor which must weigh heavily with this Court in appraising the likelihood that defendant's "fighting words" would result in violence.

It is submitted that wholly without these special surrounding circumstances, calling people "scum" in their presence is the use of a fighting word which this Court has repeatedly held without the scope of protected speech. Manifestly, such a designation in the circumstances which here concern us assumes a doubly indefensible character.

The record clearly discloses that defendant intended these epithets for persons present *inside* the auditorium. Both times he described them as "the scum that got in by mistake." Nor was his use of the word "scum" any accidental slip of the tongue. In repeating the word "scum" he apparently felt its force as an epithet to be inadequately expressive for he added the equally vile adjective "slimy" to make as unlovely a characterization as any human being could imagine being exposed to. Even then, he was not satisfied that he had been sufficiently articulate for the sentence in which he used this double epithet was: "And nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake."

This Court recognized the ineligibility of such epithets to the protection of the First Amendment when it said in *Chaplinsky v. New Hampshire*, 315 U. S. 568, at page 571:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas,

and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

In the earlier case of *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court enunciated the same doctrine:

> "One may, however, be guilty of the offense [of breach of the peace] if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." (pp. 309-10.)

In the *Cantwell* case defendant had not resorted to epithets aimed at persons in his presence. His conduct in relation to his listeners was polite and respectful and he left quietly at their suggestion. Hence this Court concluded that a conviction was not proper.

In the case at bar, however, Terminiello himself admitted his statement was "intemperate." The Appellate Court below found the evidence sufficient to warrant the conclusion that he was a "professional agitator" and a "paid agitator." (R. 16-17).) The charged manner of his presentation is apparent from the rambling incoherence and vitriolic content of his opening remarks. Finally, the words used were directed at some of his listeners and involved the use of epithets clearly as reprehensible as those involved in the *Chaplinsky* case.

Indeed, in *State* v. *O'Donnell*, 200 Atl. (N. J.) 739, the New Jersey Supreme Court said:

> "With respect to the ordinary meaning of 'rat' and 'scum of the earth' when used as epithets, it is a matter of common knowledge that they are expressions of strong opprobrium. They imply baseness of character and vileness of mind, emotions and intentions. They are selected when one intends to be offensive. * * * 'Scum' (is defined) as 'refuse, off-scourings, anything vile or worthless, hence, vile or worthless persons; low people.' I am of the opinion that such epithets are clearly offensive."

This interpretation was expressly adopted by the Supreme Court below when it said (R. 143):

> "Plainly, they were derisive, fighting words likely to cause a breach of the peace by the addressee, words whose publication constitutes a breach of the peace by the speaker. (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568.)"

It is submitted, therefore, that the judgment of the court below should be affirmed for the reason stated by that court (R. 143):

> "*Alone*, these epithets directed to certain members of the audience, constituted action tending to a breach of the peace." (Ital. added.)

Points II and III.

Defendant's conduct was properly found by the courts below to constitute: (a) incitement of his supporters in the audience to violence against the dissenters present in the auditorium; and (b) incitement of his supporters to violence against members of the group outside the auditorium.

The precise offense in this case is making or aiding "a diversion tending to a breach of the peace." Apart from

Terminiello's use of abusive epithets or fighting words considered in Point I above, his conduct could not by itself be considered an actual breach of the peace. The sound of the speech itself was certainly no disturbance of the public order.

Rather, his conduct became an offense additional to that described in Point I only if defendant can be said to have *incited* some breach of the peace.

This Court has unmistakably held that incitement to a breach of the peace is not conduct falling within the protection accorded freedom of speech. In *Cantwell* v. *Connecticut*, this Court said:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious." (p. 308.)

Incitement to two separate breaches is set forth in the headnote; before discussing the breaches directly, let us review those aspects of defendant's conduct common to both of them.

A. Analysis of the Evidence Relating to Incitement by Defendant.

In appraising defendant's conduct to determine whether the jury had sufficient evidence upon which to base a finding of incitement, three factors have to be considered: (a) what the defendant said—the content and phraseology of his speech; (b) what defendant did—his demeanor and conduct in delivering the speech; and (c) the surrounding circumstances, to permit some evaluation of the reason-

ably anticipable consequences of defendant's words and acts.[1] Only the totality of these elements permits an evaluation of defendant's conduct in terms of its "incitement" effect.

Turning first to Terminiello's speech, we must look not alone at the separate statements on particular subjects but at the gross impression the speech was likely to have made on the audience. Without here attempting a content analysis of Terminiello's remarks, we believe certain specific inferences are apparent from a careful reading of the record if the reader projects himself into the auditorium that February night:

(1) *Content.* With one possible exception discussed below, the speech was designed solely for the fomentation of hatred. To accomplish this objective Terminiello resorted to the familiar propaganda technique of concentrating on two themes:

First, by instilling *fear* into the minds of his listeners

—by stories of persecution against himself and his cohorts,

—by dire forebodings of attack by Communist enemies,

—by telling Russian atrocity stories,

—by identifying the present United States Government as Communistic,

[1] It should be noted that we do not contend that defendant incited the audience to violence against himself, except of course as set forth in Point I above. Were that question considered by this Court, we should urge that freedom of speech requires that no speaker ever be convicted under a breach of the peace ordinance for inciting violence against himself as a result of what he says, unless he resorts to epithetical language. We do not however believe that genuine freedom of speech requires the invalidation of narrowly-drawn statutes aimed at speakers who deliberately foment racial or religious hatred. Such statutes would present issues not present in this case.

—by repeatedly warning of revolution,

—by quoting the late Chief Justice of this Court as saying the Constitution would be no protection,

—by warning of a plot to undermine the FBI, recognized as the nation's bulwark against subversive plots,

—by attributing to the present United States Government atrocities in shipping South American residents to Siberia, in starving pregnant women and little babies in Germany, in inoculating Germans with disease germs, and in committing mayhem against German men,

—by charging President Roosevelt with staging the Pearl Harbor disaster for the purpose of involving all Americans in warfare,

—by accusing Great Britain of sacrificing American soldiers, and

—by accusing Jews of violence against Christians and resorting to "an-eye-for-an-eye" philosophy to compensate for Nazi mass murder of Jews.

The very number and extremity of these "fear" stories, despite the sketchiness of their review here, should demonstrate the strength of emotional impact the speech was calculated to have.

Second, interspersed with these fear-arousing tales, Terminiello translated their meaning into unambiguous expressions of *hatred* which filled the audience's need for a psychological outlet for the apprehensions defendant had fostered and fed. Starting with epithets and strong expressions of contempt for non-Christians, he successively identified Communists as the enemy, then the present United States Government as Communists, and finally Jews again, this time as Communists.

In short, defendant's speech was designedly so constructed as to foment active and extreme hatred for and fear of Jews, Communists and New Dealers. Indeed, nowhere in the speech can any content be found which is not aimed at this objective.

(3) *Demeanor.* The manner in which Terminiello delivered his speech is apparent from much of its content. Speaking extemporaneously, he started with intemperate remarks, with irascible expressions of contempt. After telling of a coming revolution in which he linked Jews, Communists and New Dealers as the cause, he wound up with an exhortation to action in typical rabble-rousing terms. In rapid, semi-incoherent fashion he said:

> "It is time you Christian men and women decided that you have the unity which comes to you from truth, the unity which comes to you from union with Christ and union with one another. That unless you stand together today, not only America but your Christian heritage will be lost to you, be lost to your children, be lost to civilization . . . We must all be like the Apostle before the coming of the Holy Ghost. We must not lock ourselves in an upper room for fear of the Jews. I speak of the Communistic Zionistic Jews, and those are not American Jews. We don't want them here; we want them to go back where they came from. We are going to stand one and all together and form a solid phalanx of courage and loyalty and strength and oppose every attempt to breach freedom of speech in America, every attempt to dilute Christianity in America, every attempt to undermine the morality of America, every attempt to shed American blood to promote Zionism in America, every attempt to demoralize our America, every attempt to persecute our cross, every attempt to destroy the sovereignty of America by union with other countries of the world, giving up our own sovereignty."

Much is made by counsel for defendant of Terminiello's verbal exhortations to the audience to restrain themselves. The Supreme Court below characterized these remarks as "double talk," quoting from Terminiello's speech:

> "They [the mob] are being led. There will be violence. That is why I say to you, men, don't do it. Walk out of here dignified. The police will protect you. We will not be tolerant of that mob out there. We are not going to be tolerant any longer. We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us. We are not going to be tolerant any longer of their pagan eye-for-an-eye philosophy."

The Appellate Court below, which under Illinois procedure is the principal reviewer of the evidence, similarly concluded:

> "If the jury, who saw and heard the defendant testify, concluded that he was not sincere in those statements, that it was a familiar trick of speech, used by experienced and professional agitators for their own protection, then such statements cannot overcome the appeal to fury, emotion, and disorder, which the rest of the speech, as already pointed out, accomplished, and the jury could well reject the claim of good faith made for the defendant."

It is submitted that the record contains sufficient evidence to support the conclusion of the triers of fact, who had the opportunity of seeing and evaluating the witnesses, that these exhortations were shallow devices designed to create the appearance of restraint but intended to be submerged in the wave of violent emotional reaction induced by the bulk of the speech.

(3) *Surrounding Circumstances.* For Terminiello to have been guilty of inciting to a breach of the peace, he

must be shown to have had reasonable notice of the surrounding factors which might determine the effect of his speech upon his audience. Manifestly, if his entire audience had been Jewish, his speech could not be interpreted as incitement to immediate violence against Jews. Most of his audience, however, were not only not Jews but were apparently anti-Semitic, as appears from their comments during the speech. That Terminiello knew their make-up is apparent from his own testimony when he describes them as "my people" (R. 116). And he testified:

> "The audience would know it was the same type of person who is trying to undermine the country. I did not assume the audience knew something that I was not telling them." (R. 117.)

Also, the record is clear that he knew of the presence of Jews in the audience when he described them as "the scum that got in by mistake." His testimony indicated further that he considered the mob outside to be communists (R. 118) and that he knew the group included Jews (R. 116-17).

* * * *

It appears therefore that defendant's speech was a clear and deliberate fomentation of hatred against Jews and Communists, among others; that he called for action to express that hatred with the knowledge that there were Jews in the audience and the belief that there were Jews and Communists immediately outside.

Let us now review his conduct in the full setting of its known impact upon the audience during the giving of the speech.

B. Defendant Incited His Supporters in the Audience to Violence Against the Dissenters Present in the Auditorium.

The opinions of the courts below review in some detail the evidence bearing upon the audience reaction during the course of Terminiello's speech. Plaintiff's witnesses testified that the audience was disturbed and angry (R. 64); that the audience howled, hooted, and shouted violently at various points in the speech; that the shouts included: "Kill the Jews"; "The Jews are all killers and murderers. If we don't kill them first, they will kill us"; and "The Jews, 'niggers' and Catholics would have to be gotten rid of." Though some of defendant's witnesses testified to the contrary, the Appellate Court below concluded:

> "Whether these witnesses heard what they claimed in their testimony, and how much reliance could be placed upon their testimony, was clearly within the province of the jury, who heard and saw all the witnesses. It is not for us upon this record to suggest that the jury should have believed the witnesses for the defendant and not those for the plaintiff, especially when there is so little conflict upon material matters. As we have pointed out, there is much corroboration of the plaintiff's witnesses as to what they heard and saw of the happenings on the outside and inside of the meeting hall." (R. 14.)

In order to evaluate Terminiello's conduct in terms of incitement, attention must be directed to the timing of his speech in relation to the audience reaction.

First, the evidence indicates that his opening remarks started off the noisy reaction from the audience (R. 64). Thus, defendant knew almost from the beginning that his audience was excited and angry at Jews. Then, far from toning down his remarks, he proceeded with "opprobrious, abusive and insulting stories" (R. 143), yielding the ex-

plicit shouts about "killing the Jews before they kill us." Indeed, defendant himself confirmed both the audience reaction and his awareness of it when he testified that *a member of the audience prompted him* to tell the story of Jewish nurses inoculating Germans with disease germs.[2] (R. 114.) Finally, either ignoring or counting on the "feverish feeling of anger and hatred" (Supreme Court below, R. 143), he wound up his speech with the most militant ranting imaginable, using the phrases quoted in A above. The direction of this feeling against dissenters in the audience is demonstrated by one witness' testimony that one man was ejected from the hall at the instance of a number of women in the audience. (R. 13, 64.)

It is submitted, therefore, that the Supreme Court below was warranted in concluding that

> "Upon the record made, the jury was entitled to believe that defendant's utterances incited an actual breach of the peace within the auditorium." (R. 143.)

The breach of the peace here referred to was the incitation of his followers in the audience to immediate violence against the dissenters whose presence was expressly recognized by defendant and communicated to his supporters.

C. Defendant Incited His Supporters in the Audience to Violence Against Members of the Group Outside the Auditorium.

To the previous resumé of the record there need only be added the evidence bearing on the direction, at defendant's incitation, of the audience's anger against the group

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[2] The transcript reports this story in somewhat garbled form but defendant identified non-Christian nurses as the culprits in his own testimony when he said: "He said that non-Christian doctors and non-Christian nurses were doing these things." (R. 118).

outside the hall. Both courts below explicitly found defendant guilty on this score.

The Appellate Court singled out defendant's express reference to the outside group, saying:

> "' * * *and millions more through Eastern Europe at the close of the war are being murdered by these murderous Russians, hurt, being raped and sent into slavery. *That is what they want for you, that howling mob outside.'* If these statements, coupled with the rest of his speech, are not an appeal to fury and an incitement to disorder and violence, then these words lose their English meaning." (R. 15.) (Ital. added.)

The Supreme Court below concluded:

> "His speech tended to incite the majority of his audience to immediate violence against the angry mob outside."

That the audience did not actually engage in violence against the group outside is irrelevant so long as the record supports the conclusion that defendant incited his listeners to such violence and a real danger of its occurrence resulted. In the *Chaplinsky* case this Court upheld the conviction involved even though no actual violence ensued.

CONCLUSION.

The disposition of this case will afford this Court its first opportunity in several years to delineate further between protected speech and speech so infused with violence as to be outside the shield of the First and Fourteenth Amendments.

It is submitted that the instant case, however, falls neatly into the established exception of speech which is

essentially incitation to immediate violence. Three separate and distinct offenses are present here, any one of which is alone sufficient to support the conviction. They are:

(1) Defendant created a diversion tending to a breach of the peace by calling members of the audience "scum" and "slimy scum", thereby using "words whose speaking constitutes a breach of the peace by the speaker." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, at 573.

(2) Defendant created a diversion tending to a breach of the peace by inciting his supporters in the audience to immediate violence against the dissenters in the auditorium.

(3) Defendant created a diversion tending to a breach of the peace by inciting his supporters in the audience to immediate violence against the group outside the auditorium.

For these reasons we urge this Court to affirm the conviction below.

Respectfully submitted,

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SHAD POLIER,
Attorneys for American Jewish Congress as Amicus Curiae.

BYRON S. MILLER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 272

ARTHUR TERMINIELLO,
Petitioner

vs.

CITY OF CHICAGO,
Respondent

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT THEREOF.

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae

FRANCIS HEISLER,
WILLIAM E. RODRIGUEZ AND
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of the New York Bar,
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ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned as counsel for the American Civil Liberties Union respectfully moves the Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the petitioner and of the respondent to the filing of this brief has been requested and the same was given by respondent City of Chicago, but was refused by counsel for petitioner.

Reasons in support of this motion are submitted as follows:

1. The American Civil Liberties Union is a nationwide organization, and through its charter, provides as its pur-

pose, among others, "To maintain throughout the United States and its possessions the rights of free speech, free press and free assemblage and other civil rights, and to take all legitimate action in furtherance of such purpose."

2. The American Civil Liberties Union submits that the petitioner in this cause was found guilty by a jury in the Municipal Court of Chicago of disorderly conduct, and he was assessed with a fine of one hundred ($100.00) dollars and costs in the amount of ten ($10.00) dollars. He was charged with having violated that section of the revised code of 1939 of the City of Chicago, which proscribes an act described as, "Did make or aid in making an improper noise or diversion tending to a breach of the peace within the limits of the City" (R. 53). The charges grew out of the occasion when petitioner delivered a speech within a hall in the City of Chicago, and certain persons protested against delivery of the speech during which a disturbance took place (R. 6-8).

The charges against petitioner were tried before a jury (R. 53) and after the finding of guilty, he appealed to the Illinois Appellate Court for the First District, which court affirmed the verdict of the jury (*City of Chicago* v. *Terminiello*, 332 Ill. App. 17) (R. 1-19), two of the judges concurring and one dissenting (R. 19-30).

A petition for leave to appeal was filed and allowed to the Supreme Court of Illinois (R. 1 and 134). The Supreme Court affirmed the verdict in *City of Chicago* v. *Terminiello*, 400 Ill. 23 (R. 145). A petition for rehearing was filed and denied (R. 146).

Subsequently, petitioner filed, before this court, his petition for a Writ of Certiorari on September 11, 1948, which petition was thereafter granted.

3. The American Civil Liberties Union submits that the freedom of speech involved in the instant petition, is a

basic tenet of the rights of the citizens, granted to them by the Constitution. The conviction of the petitioner—regardless of the subject matter of his speech and unless delivery of the speech constituted a present danger—is a violation of the Constitutional privilege of freedom of speech and is contrary to the provisions of the Federal and the Illinois Constitution.

4. The American Civil Liberties Union, in accordance with its purpose and as is provided by its charter desires to file a brief *Amicus Curiae*, to oppose the decision of the Trial Jury and Court, as well as the decisions of the Appellate Court of Illinois and of the Supreme Court of the State.

Wherefore: It is respectfully requested that leave may be granted to the American Civil Liberties Union to file the accompanying brief in this case as *Amicus Curiae*.

Respectfully submitted,

FRANCIS HEISLER,

.....

WILLIAM E. RODRIGUEZ,
CHARLES LIEBMAN,
OSMOND K. FRAENKEL,
Counsel for the American Civil Liberties Union—Amicus Curiae.

January 26, 1949.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

STATEMENT OF THE CASE.

The petition for a Writ of Certiorari heretofore allowed by this court, asked to review a decree of the Supreme Court of the State of Illinois, entered on March 18, 1948 (R. 145) in which that court affirmed the judgment of the Municipal Court of Chicago of April 8, 1946 (R. 55), in affirming the decree of the Illinois Appellate Court of June 25, 1947 (R. 133). Petitioner was found guilty by a jury of the Municipal Court of Chicago, of violating Sub-Section 1 of Section 1 of Chapter 193 of the Revised Code of 1939 of the City of Chicago, which provides:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach

> of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each 'offence" (R. 53).

The evidence on which petitioner was so found guilty is discussed in detail both in the opinion of the Illinois Appellate Court, *City of Chicago* v. *Terminiello*, 332 Ill. App. 17 and by the Illinois Supreme Court, *City of Chicago* v. *Terminiello*, 400 Ill. 23, and it is apparent that there is little controversy as to the actual facts.

It appears to us that both Illinois Appeal Courts went to great length to discuss, while apparently concerned with the Constitutional guaranty of freedom of speech, issues which are at least subsidiary. We propose to discuss only the question whether or not petitioner's conviction can stand as against the Constitutional guaranty given by the First Amendment.

As to the facts on which the conviction of petitioner is based, we shall rely on the majority opinion of the Illinois Appellate Court, from which we take it that petitioner was invited to speak in the auditorium of a building and that a printed invitation, signed by one Gerald L. K. Smith and accompanied by free-admission tickets, was distributed. The meeting was to begin at 8:00 P. M. However;

> "Around the hour of 6:30 P. M. of the day of the meeting, *a crowd gathered* in front of the building and a picket line was formed by those *in apparent protest to the appearance of the defendant* (referring *to the petitioner here*) *and the holding of such meeting;* that the size of the picket line was described variously from 250 to 500 in number . . . *this crowd and the picket line . . . were there before the start of the meeting* . . . a cordon of police was stationed around the outside of the meeting hall before the start of the meeting . . . the picket line carried banners with in-

> scriptions condemnatory of the meeting and it was so formed as to obstruct and interfere with the free access to the meeting by those entitled to enter. The crowd around the building was a surging, howling mob, hurling epithets at those **seeking to get into the meeting. Before the defendant spoke, those inside the hall could hear the loud noises and the yelling and hollering on the outside. . . . Bricks were thrown through the window panes before the speaking started and during the speaking . . . throughout the meeting they kept breaking the windows of the meeting hall** . . . (Emphasis ours).

Petitioner himself testified (again quoting from the majority opinion of the Appellate Court of Illinois):

> ". . . that *he arrived at the meeting* with Smith . . . in a hired car; that the car stopped at the front entrance, and *a crowd of 300 or 400 congregated, shouting, cursing and picketing;* that *they had to form a flying wedge to get through the picket line*, and that *police escorted them to the building; . . . when he entered the building he heard the howls of the people outside . . .*" (Emphasis ours.)

The speech delivered by the petitioner appears on pages 68 to 79 of the Record. Both the Appellate Court of Illinois and the Supreme Court of Illinois quote extensively from the stenographic transcript of the speech, and it is apparent that both of these courts considered petitioner's speech as highly intemperate. The majority opinion of the Appellate Court concludes with reference to the content of petitioner's speech, that:

> "If these statements, coupled with the rest of his speech are not an appeal to fury and incitement to disorder and violence, then these words lose their English meaning."

The opinion of the Supreme Court of Illinois stated that petitioner's:

> ". . . speech tended to incite the majority of his audi-

ence to immediate violence against the angry mob outside."

Notwithstanding of such a conclusion and notwithstanding the violence without, both Illinois Courts agree that the record discloses no violence in the hall where petitioner spoke, with the possible exception of the scene created by one member of the audience who at one point of the speech (either that of the petitioner or that of Smith) shouted: "You are a God damned liar"; after which the disturber "was ushered out by the police". One of the witnesses before the jury testified that:

> ". . . when the defendant made the statement that there was no crime too great for the Jews to commit, the woman next to her said, 'Yes the Jews are killers, murderers. If we don't kill them first, they will kill us', and that when he made reference to the Jewish nurses innoculating German women and children with syphilis and typhus germs and other disease germs, she heard people around her say, 'Why, that's terrible,' 'That is a terrible thing';"

"That at another point in his speech, she heard one in the audience say that if the Jews were not killed first, they would kill the Christians." Another witness testified that:

> ". . . during the speech of the defendant, when he made reference to the story of the non-Christian doctors and nurses, he heard expressions of anger from the audience; that he heard a man in the back of him say that the Jews, 'niggers' and Catholics would have to be gotten rid of . . . that he heard various howls, hoots, cries and shouts at various points in his speech; that he heard comments by people in the hall during the course of the speech; that when defendant spoke of the slimy scum and skunks, he heard people in the hall shout and cry out 'Tell them, Father', or 'That is right' . . . he testified that the audience was not calm; that they were disturbed and angry."
>
> ". . . he heard people around him in the audience holler, 'Yes, send the Jews back to Russia. Kill the Jews'; 'Dirty Kikes'; that when defendant referred to

> the Morgenthau plan to starve the German women and children; he heard some of the audience say, 'They ought to starve the Jews', 'They ought to kill Morgenthau', 'They ought to do the same things to him that he is doing to the Germans' . . . that on every occasion, when the people stood up while defendant was speaking, they applauded and they made violent shouts, such as 'Dirty Kike, kill the Jew, send them back to Russia.'"

There is no contradiction in the testimony before the jury that petitioner stated in his speech:

> "We are in for a profound revolution. Those of us who realize the inevitableness of the revolution, and are anxious that it be gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody. . . . Now, all of this that is going on, all of this noise that you hear around, is a part of a great plan to enrich a few at the expense of the many. . . . Didn't you ever read the Morgenthau plan for the starvation of little babies and pregnant women in Germany? . . . Why should every child in Germany not live to be more than two or three months of age? Because Morgenthau wants it that way, and so did F. D. R. . . . You will know who is behind it when I tell you the story of a doctor in Akron, Ohio. He boasted to a friend of mine within the last few days, while he was in the service of this country as a doctor, he and others of his kind made it a practice—now, this was not only one man—made it a practice to amputate the limbs of every German they came in contact with whenever they could get away with it; so, that they could never carry a gun. . . . The nurses, they tell me are going to inject disease in them, syphilis and other diseases in every one that came there, all of one race, all non-Christians. . . . We will not be tolerant of that mob out there. We are not going to be tolerant any longer. We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and date them to smear us. . . ."

The majority opinion of the Appellate Court of Illinois said:

"It was in this setting and surrounding atmosphere, an atmosphere full of tenseness, mob excitement, with an audience, as we have pointed out, stirred to emotional reaction, that the defendant delivered his speech. The jury heard from the defendant that he had previously had difficulty of the same character in the City of Cleveland, where he undertook to address a meeting and was threatened and surrounded. . . . The jury had the right to believe that the defendant knew that the very presence of Gerald L. K. Smith with him at a meeting of this type would likely produce a mob gathering and mob resentment and violence. . . . Knowing all this and the likelihood of the effect that such a speech as the instant one would have upon an audience under such conditions, we do find that defendant's speech and conduct not only had a tendency to create a diversion tending to a breach of the peace but, in reality, there was created such a diversion and breach of the peace. No other reaction could reasonably be expected . . ."

The Supreme Court of Illinois concluded on the record that:

"As to the majority of the audience, defendant by his provocative and inflammatory utterances, instilled in them the fear of revolution, domination and murder by what he described as the criminal Jewish element in America and, more particularly, by the mob outside the auditorium. . . . In this manner was defendant guilty of a diversion tending to a breach of the peace by his wild, intemperate and inflammatory utterances. His speech tended to incite the majority of his audience to immediate violence against the angry mob outside. That his listeners did not engage in violence with the angry crowd is immaterial."

As applied to the facts in this case, the ordinance in question and the conviction thereon was, as we submit, in conflict with the First Amendment of the Federal Constitution. It is our contention that in its application, the City Ordinance of Chicago is repugnant to Section 1 of the XIVth Amendment of the Constitution of the United States.

ARGUMENT.

The Ordinance of the City of Chicago invoked against the petitioner is applied contrary to the provisions of the First Amendment of the Federal Constitution.

We submit that on the record, the Ordinance of the City of Chicago referred to in the common parlance as the "Disorderly Conduct Ordinance" cannot cover facts as in the instant case, in the face of the provisions of the First Amendment to the Federal Constitution concerning freedom of speech. We also submit what is apparent from the recitation of the facts, the majority opinion of the Appellate Court of Illinois and the Supreme Court of the State, that while there was a great deal of disturbance outside of the hall, in anticipation of the appearance of the petitioner and the speech to be delivered by him, there was nothing transpiring within the hall, and within the audience, that could be considered forbidden by the provisions of the ordinance invoked. If appears to us that the decision in this case, if permitted to stand, will create a dangerous precedent to abridge freedom of speech in this country, in that an advance censorship by opponents of a speaker will become legalized.

We have, of course, no quarrel with the condemnatory language of the majority opinion of the Illinois Appellate Court and of the Supreme Court of Illinois as to the content of petitioner's speech. What we are attempting to make clear, is that the violence, the disturbance, the picketing of the hall by a disorderly mob, had for its purpose to prevent petitioner from delivering his speech, because *it was anticipated by the mob that his speech would be just the kind of speech that he in fact delivered.*

We agree with Lord Justice Scrutton who stated:

> "The law of this country has been very jealous of any infringement of personal liberty. This care is not to be exercised less vigilently because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous. *Rex* v. *Secretary of State, Ex Parte O'Brien* (2 K. B. 382).

We agree with the Illinois Courts that petitioner and his speech, to say the least are not meritorious. However, the test of belief in principles is made when one applies them to cases with which one has no sympathy at all. There is no denial, if one reads the majority opinions of the Illinois Appellate Court and the Supreme Court of Illinois, that both of those courts applied the ordinance in question—in retrospect as it were—and because of the subsequent events, presumed that it is justifiable to conclude that the violence of the mob outside the hall, beginning about an hour and one-half or two hours before the speech was actually delivered, was created by the subsequently delivered speech. It is hard, if not impossible, to comprehend how petitioner was able, by his appearance at 8:00 o'clock, to create a diversion or disturbance of peace within a mob that gathered before the auditorium an hour and one-half or two hours before that hour, *to prevent* petitioner from delivering the speech.

If we follow the reasoning of the majority opinion of the Illinois Appellate Court and of the Supreme Court, the conclusion must be that a person who knows, from the presence of a hostile crowd, that his speech will be resented because of the controversial nature of his thoughts, must desist from making the speech—otherwise he will be found

guilty of violating the disorderly conduct ordinance of the City of Chicago.

An interesting thought occurs in this connection and that is, assuming that petitioner, upon arriving at the scene and seeing pickets, the signs and the howling mob, the sentiment of which was directed against him, would have changed his mind and had refrained from delivering the speech. There is no question that the disorder already had taken place. The disorder was created by the anticipation of the mob as to the speech to be delivered by petitioner. Would petitioner then still be guilty of violating the ordinance? It seems to us that if the decision of the Illinois Supreme Court is to stand, that that would be a logical conclusion.

There is, however, another possible extension of the present ruling of the Supreme Court of Illinois. It seems that the same would proscribe the delivery of any speech as long as there is a group of men and women so much opposed to the prospective speech that it is willing to go out and attempt, by mob demonstration, to prevent the speaker from entering the hall or if he does succeed in doing so, from delivering his speech.

We submit that there is a dangerous possibility as to the legalization of advance censorship of any speech that finds no pleasure in the minds of a group of opponents.

There is little controversy concerning the proposition that peace is good. There is almost unanimous agreement that advocacy of peace among nations is a commendable one. Nevertheless, under the present decision of the Supreme Court of Illinois, it can be visualized that an advocate of peace may be found guilty of the violation of the ordinance of the City of Chicago under conditions as follows: A person of unquestioned integrity, of high moral character and a firm believer in peace does—to advance his peace aims—

hire a hall where he intends to and subsequently does deliver a speech based on brotherhood of all mankind, in condemnation of the use of force among nations and in advocacy of establishing peaceful relations with a nation with which ours is at war. It is not impossible to visualize that there are people with no kindness in their heart, with no respect to their ancestors and with no charity to children of their own and others, and who desire to prevent the delivery of the peace harangue. It is possible to see such bitter men and women congregating around the hall one and one-half or two hours before the speech is to be delivered. They are carrying signs condemning the peace advocate. They are determined that the speaker is not to reach the hall or if he does, he be prevented from speaking and the audience from hearing him by creating commotion, disorder, breaking of windows and by other means usually at the disposal of a disorderly crowd. The peace advocate, believing that it is his duty to preach peace, and believing that his is the right under our Constitution freely to speak, reaches the hall and delivers his speech. Is it far-fetched to say that under the decision of the Supreme Court of Illinois and under the circumstances hereinabove described the peace advocate would have been guilty of violating the city ordinance pertaining to disorderly conduct?

The present decision of the Supreme Court of Illinois, if permitted to stand, will effectively take away the right of anyone freely to speak just as soon as there are others determined enough to express their collective disapproval of the speech to be delivered. The implications of the decision here involved carries a foreboding that the First Amendment to the Federal Constitution can be nullified by a reverse English as it were. It can be nullified because one has to do nothing more to make his opponent's right to freedom of expression a nullity than to gather a crowd

of rowdies in advance of the proposed speech and to express as vociferously as possible his disagreement with the speaker.

We do not believe that this is the law and therefore we believe that the decision of the Supreme Court of Illinois ought to be reversed.

* * *

The majority opinion of the Illinois Appellate Court took cognizance of certain facts:

> "The demonstration on the outside of the meeting hall is one we must condemn as un-American and as clear a violation of law as can come to the observation of any court. Many of them were arrested but the police should have done their full duty by dispersing the mob and suppressing the demonstration."

We are in full agreement with that statement of the court and we are also in full agreement with the further statement: "However, this demonstration is no defense to the charge against this defendant." We disagree, however, that the demonstration could, in law, have been caused by the subsequent speech of the petitioner.

There is indication in the majority opinion of the Appellate Court that the diversion and the gathering of the hostile mob were created by the past performance of petitioner. It is stated that:

> "The jury had a right to believe that the defendant knew that the very presence of Gerald L. K. Smith with him at a meeting of this type would likely produce a mob gathering and mob resentment and violence."

If petitioner's past conduct justified the finding of the jury and the subsequent conclusion of the court in agreement therewith, that such was the cause of the mob's disorder, another question arises.

Let us assume that petitioner, following his prior speech,

which created a disturbance in Cleveland to which the majority opinion of the Illinois Appellate Court refers, would have had a change of heart. It is not beyond the realm of possibility that he, a priest of the church, would actually desire to follow in the footstep of the "Prince of Peace" and would have decided to deliver a speech in Chicago, which represented no "double Talk" as the Supreme Court of Illinois referred to his delivered speech, but truly a Christian speech calling upon the audience to love their neighbor, that they turn the other cheek and that they do unto others as they would want others to do unto them. Nevertheless, the hostile crowd, wrongly anticipating his speech to be delivered, creates a disturbance and so the diversion is an accomplished fact. The speech, however, is one contrary to the mob's expectation—one of love, of human kindness and of endeavor to influence the audience to live in accordance with the precepts of human decency. Would petitioner still be guilty of having created a diversion? It seems to us that under the decision of the Supreme Court, he would indeed be guilty of having created the violence of the mob so wrongly anticipating the content of the speech.

The examples can be multiplied to show the possible application of the Supreme Court decision here involved, *ad absurdum*. The American Civil Liberties Union, greatly concerned in the preservation of freedom of speech in this country, believes that the decision of the Supreme Court of Illinois is impregnated with danger and if permitted to stand, will greatly curtail the right of the citizens to freedom of speech and will, in effect, legalize prior censorship of controversial speeches by antagonistic elements thereto.

Conclusion

It is respectfully urged that the decision and the decree of the Supreme Court of Illinois of March 18, 1948, affirming judgments of the Municipal Court of Chicago of April 8, 1946 and the Illinois Appellate Court for the First District of June 25, 1947, be reversed.

Respectfully submitted,

American Civil Liberties Union
Amicus Curiae

Francis Heisler,

.....

William E. Rodriguez &
Charles Liebman,
Osmond K. Fraenkel,
Counsel for American Civil Liberties Union.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948

No. 272

272

ARTHUR TERMINIELLO,
Appellant,

vs.

CITY OF CHICAGO,
Appellee.

CERTIORARI TO SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. MCCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

PETITION FOR REHEARING.

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SUMMARY OF ARGUMENT:

I. The decision of the court violates its own rules and is contrary to a long line of its own decisions 2

(a) Rule 38 of this court limits review to questions specifically presented by the petition for writ of certiorari 2

(b) Errors not assigned and relied upon should not be considered because neither party has had an opportunity to brief or argue such points in this court 3

(c) Assignments of error appearing in the record but not mentioned in the argument will not be considered by this court 4

(d) The decision of this court is based on an instruction given to the jury which was not objected to by the defendant; was not asserted as error in any motion for new trial in the trial court; was never asserted in the Illinois Courts of Review as a basis for reversal; was not asserted in the petition for certiorari in this court and has been explicitly disavowed at the bar of this court by petitioner's counsel 4

(e) Orderly procedure requires that the parties shall have an opportunity to brief and argue points asserted as error 5

(f) Sudden change in the procedural requirements without notice to the parties is in violation of elementary rules of jurisprudence. 5

(g) An objection to the charge of a trial judge must be specifically made in order to give him an opportunity to correct errors and omissions before they are made the basis for an assignment of error and review 6

(h) The practice in Illinois and the rules of the Municipal Court of Chicago require that objections to an allegedly erroneous instruction must be specifically called to the attention of the trial court or the error is not available on review 6

(i) Elementary justice requires the court to give the parties a full opportunity to brief and argue the unasserted error or the parties are deprived of a fair day in court 7

(j) The case was accepted for review on the basis of errors assigned in the petition for certiorari but the opinion of the court is on a point not therein asserted 8

II. Had the appellee been aware of the asserted error or of the court's intention to base its decision thereon, it would have argued the point in its brief and oral argument 8-9

(a) Appellee would have pointed out that the portion of the instruction criticized by this court should have been disregarded as harmless error because it is clearly inapplicable to the undisputed evidence which shows that the petitioner created a disturbance of the peace by the use of the epithets "scum" and "slimy scum" to members of his audience.. 9

(b) As applied to the specific facts in this record, the criticized portion of the instruction was irrelevant and the judgment should stand on the basis of the applicable portion of the instruction to the undisputed facts 9

(c) An inaccuracy in an instruction is not ground for reversal if, as applied to the evidence then before the jury, the inaccuracy could not have worked injury to the defendant ... 10

(d) Only one who is harmed or affected by an unconstitutional construction of an ordinance can complain. The admitted use of classical fighting words by the appellant takes him outside of the constitutional guarantee of free speech and he has not been injured by the criticized instruction nor is the ordinance as to him unconstitutional 11

(e) An erroneous instruction, even when objected to in apt time and properly made the basis of an assignment of error on appeal, does not warrant a reversal without a remandment 12

(f) The appellee's motion for a directed verdict finding the appellant guilty at the close of all the evidence should have been sustained on the undisputed evidence that Terminiello was guilty of a breach of the peace by addressing epithets to members of the audience which have been held to have the force of blows and invite retaliation. Where a verdict of guilty could and should have been directed, an error in the giving of an instruction does not furnish a ground for reversal 12-13

(g) The failure of the appellant to set forth in the transcript of the record all of the instructions given precludes him from basing an assignment of error on any one instruction.. 13

III. The undisputed facts in the record show clearly that appellant's words and conduct produced a clear and present danger to the public peace.... 14

(a) In view of the admitted facts in this record, it cannot be denied that Terminiello was guilty of a breach of the peace which the public authorities have a right to punish. Inasmuch as the municipality is made liable by statute for damages to persons or property resulting from mob violence, it should not be prevented from taking appropriate action against the instigator of the disturbance 14-15

Conclusion 15

Under the decision of this court in Chaplinsky v. New Hampshire, the appellant is guilty of a breach of the peace and none of his constitutional rights are violated by punishing him 15-16

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948

No. 272

ARTHUR TERMINIELLO,

Appellant,

vs.

CITY OF CHICAGO,

Appellee.

CERTIORARI TO SUPREME COURT OF ILLINOIS, THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. McCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

PETITION FOR REHEARING.

Now Comes City of Chicago, a municipal corporation, appellee herein, by Benjamin S. Adamowski, Corporation Counsel of the City of Chicago, its attorney, and respectfully prays that the Court grant a rehearing herein and in support of said petition for rehearing submits the following:

I.

This Court has rendered a decision in a manner which violates its own rules and is contrary to a long line of its own decisions.

The disturbance created by the appellant Terminiello was a mere trifle compared to the blow which this court has given to the orderly processes of judicial review by the decision of the majority of the court. The court has ignored its own rules and has acted directly contrary to a long line of its own decisions and has thereby avoided a decision of this case on the basis of the issues urged as error and argued before this court.

The second paragraph of Rule 38 of this court, dealing with review on writ of certiorari contains the following statement:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

This rule has governed reviews by this court during the many years of its existence. In *Hutchins* v. *King*, 4 Wallace 53, 60; 17 L. ed. 544 this Court said:

> "Some other positions were pressed by the plaintiffs in error upon the attention of the court on the argument, but we do not notice them; because what is termed in the transcript 'a bill of exceptions' does not show that any exception was taken to the rulings of the court. * * * To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon."

In *Flournoy* v. *Wiener*, 321 U. S. 253, 88 L. ed. 708, this court (p. 259) said:

> "Rule 9 of this Court's Rules requires the appel

lant in all cases to file assignments of error 'which shall set out separately and particularly each error asserted,' and paragraph 9 of Rule 13, requiring the statement of points to be relied upon, provides that 'The Court will consider nothing but the points of law so stated.' See also Rule 27, par. 6. It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon even though properly presented to and passed upon by the state court. *O'Neil* v. *Vermont*, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; *New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646, 651, 69 L. ed. 1135, 1137, 45 S. Ct. 618; *Herbring* v. *Lee*, 280 U. S. 111, 117, 74 L. ed. 217, 221, 50 S. Ct. 49, 64 ALR 1430; *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86, 91, 77 L. ed. 180, 184, 53 S. Ct. 32, 86 ALR 174; *Southern P. Co.* v. *Gallagher*, 306 U. S. 167, 172, 83 L. ed. 586, 590, 59 S. Ct. 389; *Jones* v. *Opelika*, 316 U. S. 584, 592, 86 L. ed. 1691, 1698, 62 S. Ct. 1231, 141 ALR 514. The rule is the same in the case of applications for certiorari. Rule 28, p. 2; *General Talking Pictures Corp.* v. *Western Electric Co.* 304 U. S. 175, 179, 82 L. ed. 1273, 1275, 58 S. Ct. 849; *National Licorice Co.* v. *National Labor Relations Bd.*, 309 U. S. 350, 357, 84 L. ed. 799, 807, 60 S. Ct. 569."

and again at page 261 this court said:

"But this question is not before us because appellant, by his statement of points to be relied on, has affirmatively excluded it from consideration on this appeal and has limited himself to the different question arising under the Fifth Amendment. *In any case we ought not to consider it here because in reliance upon this declaration neither party has briefed or argued it in this Court. Rule 27, par. 6 declares that errors not urged in the briefs will be disregarded. And, independently of 'technical' rules it is not the habit of this Court to decide important constitutional questions which the parties have not presented, briefed or argued.*" (Italics supplied.)

In addition to the cases cited in the *Flournoy* case, other decisions by this court expressly adhering to the rule that

this court will not consider errors which are not assigned in the petition for certiorari include *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 48, 91 L. ed. 1328, 1335; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 357, (footnote), 84 L. ed. 799, 807; *Dickinson Industrial Site Inc.* v. *Cowan*, 309 U. S. 382, 389, 84 L. ed. 819, 825; *General Talking Pictures Corp.* v. *Western Electric Co. Inc.*, 304 U. S. 175, 179, 82 L. ed. 1273, 1275; *Gunning* v. *Cooley*, 281 U. S. 90, 98, 74 L. ed. 720, 726; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182, 79 L. ed. 264, 270; *Helvering* v. *Taylor*, 293 U. S. 507, 511, 79 L. ed. 623, 627.

This court has also held that on review it will not consider assignments of error appearing in the record but not mentioned in the argument, *Southeastern Express Company* v. *Miller*, 264 U. S. 541, 542, 68 L. ed. 840, 841.

Many more cases are available in support of this rule but we deem it unnecessary to cite them. It is sufficiently established by the foregoing citations that this court has repeatedly announced that its review is restricted to the errors alleged in the petition for certiorari and that it will not consider points not there asserted nor will it consider points which are asserted but are not argued. Despite this well established limitation on the court's procedure on review, this court has completely ignored the rule and has decided the instant case on an instruction given to the jury which was not objected to by the defendant, was not set forth in any motion for new trial in the trial court, was nowhere asserted in the review courts of Illinois as a basis for reversal; it was not alleged in the petition for certiorari in this court as an error justifying review and, as Mr. Justice Frankfurter aptly pointed out in his dissenting opinion, it was explicitly disavowed at the bar of this court by petitioner's counsel.

It hardly seems necessary to argue the necessity for this well established rule of procedure. This court has so

frequently had occasion to consider the rule and the reasons therefor in so many of its decisions that we are at a loss concerning what we could possibly urge upon this court that it has not already heretofore considered in the many cases referred to. The whole theory of American and English jurisprudence, in so far as it applies to appellate review, is that a review is confined to errors assigned. The decision in this case is basically erroneous because as this court so aptly pointed out in *Flournoy* v. *Wiener*, 321 U. S. 253, 261, from which we have hereinabove quoted, it disposes of the case on a point which neither party has briefed or argued in this or any other court. The decision constitutes a complete negation of orderly procedure for review. In the light of this decision, no member of the bar of this court can ever know what he might anticipate in the way of argument or decision if this court is free to decide a case upon a point which is neither asserted nor argued. The decision seems all the more incomprehensible in view of the express disclaimer by the appellant of any intention to rely upon the point upon which this court based its decision.

We can appreciate that the law is constantly changing but it is inconceivable that the rules relating to procedure should be changed in the highest court of the land without any advance notice to the participants in the litigation. In every field, professional, business or sports, it has always been considered elementary that the game is played according to well recognized rules. Changing the rules without notice to the participants can never be condoned and certainly should never be done by the highest court of the land. The reports are full of cases where the courts of review have condemned lower courts for departing from well recognized rules of procedure, yet in this case we have the highest court, from which there is no appeal.

guilty of the very practice which has so frequently been condemned.

The court has also repeatedly and expressly held that an objection to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis for an assignment of error on review, and that this is the only course fair to the court and the parties. *McDermott* v. *Severe*, 202 U. S. 600, 610; *Guerini* v. *Carlin*, 248 U. S. 334, 338; *Penna. RR. Co.* v. *Minds*, 250 U. S. 368, 375; *Palmer* v. *Hoffman*, 318 U. S. 109, 119.

The practice in Illinois also requires that objection be taken to an erroneous instruction and that the erroneous instruction be specifically called to the attention of the trial court in the motion for a new trial. Failure so to do requires the court of review to refuse to consider any error relating to the instruction. The action of this court is doubly erroneous in that it violates its own practice as well as that established in Illinois.

Rule 62 of the Municipal Court of Chicago relating to instructing the jury provides as follows:

> "(3) Objections to the charge must be made before the jury retire and out of the presence of the jury. They must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made, and upon the objections being made the judge may make such corrections as he may deem proper."

In view of the failure of appellant to comply with the requirements of the practice in the Municipal Court of Chicago, of the State of Illinois, and of this Court, we submit that this Court should not reverse the judgment on the basis of the criticized instruction.

The plainest consideration of justice demands that there be a rehearing in this case if for no other reason other

than that the plaintiffs in the case were given no opportunity to argue the point which has been made the sole ground of decision. Even assuming that a court has a right or even in fairness should unearth a point that neither of the parties has suggested, elementary justice requires that the Court give the parties a full opportunity to argue it. Here not only was the point nowhere raised in the long judicial proceedings through four courts, but when first suggested by a member of this court during the oral argument the appellant, in open court, disavowed any claim for relief from this court on that ground.

To allow the decision to stand under these circumstances not only deprives the plaintiff in this case of a fair day in court but establishes a precedent of such magnitude and force as to amount to a tying of the hands of law enforcing agencies throughout the country without the question having ever been properly argued before this tribunal, and this in view of the significant fact that four out of the nine members of this Court disagreed with the logic and soundness of the decision. If, after a full opportunity to argue this question, the Court should reach the same conclusion, we may not be satisfied with it but we shall at least know that we have enjoyed a privilege basic to our democracy, namely, a full and complete hearing.

If we had even remotely suspected the possibility of this result we would have called the Court's attention to the entire record and to all the instructions, which, although not in the abstract, appear in the record, with a view toward convincing the Court that when read as a series of instructions the condemned portion was cured. We point to this simply by way of illustration, for there are other points we might have argued had we remotely suspected the Court's advocacy of the point.

We respectfully ask the Court to reopen this case for further argument so that the officers of every municipality in the land may be assured that in these vital matters affecting their authority and power to maintain peace and order in their community they have not been made impotent without a fair day and an opportunity to be heard by this tribunal.

In the majority opinion the statement appears: "The case is here on a petition for certiorari which we granted because of the importance of the question presented." It is ironical that the importance of the question presented by the petition for certiorari was considered by the majority of the court distinct and apart from the facts of the case, for it seems clear that the court was less concerned with the facts presented by the petition for certiorari than it was with an instruction hidden away in the record.

The dissenting opinions of Mr. Chief Justice Vinson and Mr. Justice Frankfurter point out the inapplicability of *Stromberg* v. *California*, 283 U. S. 359, to the instant situation. Certainly their vigorous analysis shows the clear distinction between the cases. There it appears that the constitutional question was squarely raised and passed upon. Here the instruction has never been presented for consideration.

II.

The theory of the majority of the court deprives the appellee of an opportunity to argue the question of the instruction which forms the basis for the court's decision.

The majority opinion does not decide the case on the basis of any point asserted or argued in the briefs of either party. Had the appellee been made aware by any assertion of the appellant that the instuction given to the jury would

have been assigned as error, or had we known that this court intended to make the instruction the basis of its decision, we would have argued the point and shown reasons to the court why this instruction does not vitiate the judgment against appellant. Had we had the opportunity, we would have pointed out:

1. The criticized portion of the instruction can be disregarded as harmless error because it is clearly inapplicable to the undisputed facts in this case.

The instruction charged, as follows:

> "The misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm" (Tr. 129).

This instruction is not to be construed in a vacuum but is to be construed as it applied to the facts in this case. The record shows that Terminiello addressed to members of the audience the epithets "scum" and "slimy scum". There is no dispute on this point. In so far as the instruction refers to stirring the public to anger, inviting dispute and bringing about a condition of unrest, under well settled rules of practice, this portion of the instruction can be disregarded as surplusage or harmless error in that it has no application to the specific "fighting words" used by him. In *Swisher* v. *Deering*, 204 Ill. 203, the court (p. 207) points out that where proof of guilt is so clear that on the facts the jury could not have found otherwise, the "court will not reverse a case for error in an instruction. * * *" In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, the jury was instructed as follows:

> "The legislature of our state has seen fit to affix a penalty to the act of addressing any offensive, derisive

> or annoying words to any other person who is lawfully in any street or other public place."

The ordinance of the City of Chicago under which appellant was charged states simply "all persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of peace, or diversion tending to breach of the peace, * * * shall be deemed guilty of disorderly conduct, * * *".

Under this ordinance the portion of the instruction which charges:

> "The misbehavior may constitute a breach of the peace if it * * * creates a disturbance * * *."

applies specifically to the undisputed facts in evidence that the appellant addressed the epithets "scum" and "slimy scum" to members of the audience. Under the *Chaplinsky* decision there can be no criticism of this portion of the instruction as it applies to these precise statements.

Under the circumstances, had the appellant objected to the instruction in the trial court, the trial court would have had an opportunity to delete from the instruction the portion which has no reference to the facts in evidence. This he could have done under the well settled rules of practice to which we have heretofore referred, but regardless, there can be no dispute that the instruction, with the irrelevant portion deleted, meets the test of constitutionality established by this court in the *Chaplinsky* case. An inaccuracy in an instruction is not ground for a reversal, if, as applied to the evidence then before the jury, such inaccuracy could not have worked injury to the defendant. *Chicago City Railway Co.* v. *Cooney*, 196 Ill. 466, 472.

2. No complaint can be made that an instruction is unconstitutional unless, on the facts in the case, the ordinance as so construed is both unconstitutional and affects the one complaining.

It is a well settled rule of law that one who is not affected by the unconstitutional portions of an ordinance or statute cannot complain of its unconstitutionality. Only one who is harmed or affected by an unconstitutional construction of an ordinance can complain. *Roberts, et al. v. Emmerson*, 271 U. S. 50, 54-55. In *Voeller v. Nielston Warehouse Co.*, 311 U. S. 531, this court (p. 537) said:

> "* * * this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions."

As we have herein demonstrated, the ordinance on the facts in this case, as applied to the "fighting words" admittedly used, is valid. Nothing in the majority opinion alters this ruling established by the *Chaplinsky* and *Cantwell* cases. The irrelevant portion of the instruction forms the basis for this court's conclusion that the ordinance has been construed so as to infringe upon appellant's constitutional right of freedom of speech. Inasmuch as it clearly appears that such a construction can have no application to the epithets which he used, it follows that no unconstitutional application of the ordinance has formed the basis for this conviction. The appellant is therefore in no position to complain; in fact he has not complained, and the Court is not justified in making the complaint for him on a hypothesis not presented by the facts.

We therefore respectfully urge that, had we been given an opportunity to argue this point, we would have called this to the attention of the court and the court would doubtless,

in view of the well settled law on this point, have not arrived at the conclusion reached by the majority.

3. An erroneous instruction does not warrant a reversal without a remandment.

It is well settled that an erroneous instruction, even when objected to in apt time and made the basis of an assignment of error on appeal, does not warrant a reversal without a remandment. The practice is that the trial court must be given an opportunity to instruct the jury correctly. This court has recognized the practice in *Stromberg* v. *California*, 283 U. S. 259, where the court pointed out that the cause would have to be remanded.

4. The trial court should have granted appellee's motion to direct a verdict for plaintiff on the undisputed evidence. An erroneous instruction, under these circumstances, does not warrant reversal.

Another point which we would have urged upon the court's attention is that the City filed a motion at the close of all the evidence for a directed verdict to find Terminiello guilty (Tr. 126). The law in Illinois is well settled that a proceeding for a violation of an ordinance is not a criminal prosecution but is a civil suit and that the rules of civil procedure are applicable.

City of Chicago v. *Knobel*, 232 Ill. 112;
City of Chicago v. *Williams*, 254 Ill. 360.

In view of the undisputed facts in this record, which show that Terminiello addressed the epithets "scum" and "slimy scum" to members of the audience, and in view of the holding of this court in *Chaplinsky* v. *New Hampshire*, and in view of the cases which hold that such epithets have the force of blows and invite retaliation and therefore con-

stitute a breach of the peace when used, it would have been appropriate for the trial court to direct a verdict of guilty. Had the trial court done so, it would have been unnecessary in any event to have instructed the jury and the offending instruction would never have been in the case. Certainly there would have been no necessity for this or any other instruction had the trial court granted the City's motion for a directed verdict at the close of all the evidence. Since a verdict might properly have been directed against the defendant, and a contrary verdict would have, on the undisputed facts, been unwarranted, errors in instructions will not furnish a ground for reversal.

Howe Machine Co. v. *Ballwegg*, 89 Ill. 318, 320;
Swisher v. *Deering*, 204 Ill. 203, 207.

It should also be noted that by his admission that he used these "fighting" words, appellant has practically pleaded guilty.

5. Under the Illinois practice, the failure of Appellant to set out all of the instructions given precludes him from asserting error on any one instruction.

We would also point out that the appellant is precluded from complaining of the instruction because of his failure to comply with the requirements of the Illinois law which make it mandatory for an appellant to set forth *all* of the instructions for the plaintiff and the defendant in order to obtain a review based on an instruction. *Madison* v. *Wedron Silica Company*, 352 Ill. 60, 62;

A comparison of the instructions contained in the transcript, at pages 128-129, with the record will readily disclose the omission. His failure to present all of the instructions given to the jury violates the Illinois practice and this court, being bound by the law of the State of Illinois as to such matters, could not properly consider an objection to an instruction even had objection been seasonably made.

III.

The court has overlooked the facts in this record which show clearly that appellant produced a clear and present danger to the public peace.

The opinion points out that freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. Of what use is it for the court to state constitutional guarantees as abstractions yet fail to apply these theories to factual situations when they appear in this court.

Here is presented a precise factual situation which has already been before three courts in Illinois. The evidence shows the use of classical fighting words "scum" and "slimy scum" addressed to members of the audience in the hall where Terminiello made his speech.

Inside the hall the audience were moved to howls, cries and shouts to "kill the Jews", "kill Morgenthau", "get rid of Jews, niggers and Catholics", "cripple them", "sterilize them." Is this what the court considers to be merely "public inconvenience, annoyance or unrest"?

This was a howling mob being incited not to a mere disturbance of the peace, but to murder and violence.

Consider further, Terminiello's incitement:

"We will not be tolerant of that mob out there. We are not going to be tolerant any longer.

We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and dare them to smear us."

Must the authorities wait until a rabble-rouser cries "Come on, let's kill them" and actually leads the rioters

to the assault, before they can arrest him. But then the damage is done.

Illinois, like most states, has statutes which make municipalities liable for damages to persons or property resulting from mob violence (1947 Ill. Rev. Stat. Ch. 38, pars. 512-524). Yet this court's decision prevents the city from taking action before the damage is done by arresting the rabble-rouser. It would be an ironic state of affairs when the city cannot punish for breach of the peace but must respond in damages for the results of the peace-breaker's depredations.

Conclusion.

In *Chaplinsky* v. *New Hampshire*, this court held that a person could constitutionally be punished for the utterance of "fighting words" and that such "fighting words" constituted a breach of the peace. It is admitted that the defendant uttered "fighting words" namely "scum" and "slimy scum" and addressed them to his audience. He thereby clearly breached the peace. He thereby clearly violated the ordinance prohibiting a breach of the peace. *Chaplinsky* v. *New Hampshire* clearly establishes that constitutionally the city had a right to punish the defendant for so breaching the peace. Yet this court has held that the defendant's right of free speech has been impaired. Why? As we read the opinion, apparently because the instruction gave an interpretation to the ordinance which would permit prosecution of some hypothetical person who might utter words not constituting "fighting words". Assuredly this cannot affect the right of the public to punish defendant for an admitted breach of the peace according to a precise construction of the ordinance as narrow as that heretofore sustained by *Chaplinsky* v. *New Hamp-*

shire. We confess that we cannot understand from the court's decision what constitutional right enjoyed by defendant compels the reversal of a conviction for words and conduct for which the constitution admittedly grants no immunity.

We respectfully submit that this court should reconsider its decision and grant a rehearing on the basis of what is hereinbefore set forth and upon rehearing should either hold that the basis of the opinion is erroneous in that it is predicated on an alleged error not properly before this court, or reconsider its decision in the light of the arguments herein contained and affirm the judgment of the courts of Illinois, or, at the very least, remand the cause for a new trial.

Respectfully submitted,

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Certificate.

I do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

L. LOUIS KARTON,
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